No. 2448

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Appellant,

vs.

WILLIAM SMITH,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys of Record.

Messrs. WALSH, NOLAN & SCALLON, Helena, Montana.

Solicitors for Complainant and Appellee.

Messrs. H. G. & S. H. McINTIRE and R. LEE WORD, Esq., Helena, Montana,

Solicitors for Defendant and Appellant.

[1*]

In the District Court of the United States in and for the District of Montana.

No. 5—IN EQUITY.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

BE IT REMEMBERED that on May 17, 1913, the complainant filed his bill of complaint herein, in the words and figures following, to wit: [2]

In the District Court of the United States in and for the District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

*Page number appearing at foot of page of original certified Record.

Bill of Complaint.

Now comes the above-named complainant, William Smith, and complaining of the above-named defendant, alleges and shows to the Court the following, to wit:

I.

That the complainant is a citizen and resident of the State of California.

That the defendant is a citizen and resident of the State of Montana.

II.

That the ground of jurisdiction, in this case, is diversity citizenship between the parties hereto.

III.

That the complainant is one of the children of the late William A. Smith, who departed this life in the said County of Meagher on the 13th day of February, 1897; that said William A. Smith left three children, to wit, the complainant and two sisters of the complainant, and that these were the only heirs of William A. Smith; that on the 28th day of March, 1899, the above-named John M. Smith, deceased, was duly appointed guardian of this complainant and of his two sisters by the District Court of the (then) Ninth Judicial District of the State of Montana, in [3] and for the County of Meagher aforesaid; that thereafter, to wit, on the 25th day of May, 1899, the said John M. Smith filed the bond required by law and the oath of office required by law in such cases and duly qualified as such guardian, and thereupon he became and thereafter continued, until the major-

ity of this complainant the duly appointed, qualified and acting guardian of said complainant; that on the 14th day of June, 1899, the said John M. Smith received from N. B. Smith, who had been executor of the estate of William A. Smith, deceased, the sum of eighty-two thousand one hundred and seventy-four and 20/100 dollars ($82,174.20), and that he received this sum as the guardian of this complainant and of his two sisters; that one-third of the said sum was the property of this complainant; that on said 14th day of June, 1899, the said John M. Smith appropriated and converted all of the said money to his own use and then and there paid the same out to a creditor of himself to whom he owed a debt in his personal capacity, and that thereafter he did not invest the said money or any part thereof or seek an investment for the same, but, on the contrary, the same remained and continued to be appropriated and converted to his own use during the minority of said complainant, except in so far as payments on account *there-* were made for the use or on account of this complainant during his minority; that said John M. Smith wilfully failed and neglected to invest any of the moneys received by him as guardian of this complainant, and that the interest which he allowed as hereinafter set forth, as well as the principal, was by him retained and converted to his own use and appropriated by him and kept appropriated by him to his own uses all during the minority of this complainant, except in so far as payments were made on the account of this complainant, as will be more fully herein set forth; that in addition to the aforesaid

sum, the said John M. Smith also received, in his capacity as guardian of this complainant, various sums received as dividends from the First National Bank of White Sulphur Springs [4] upon stock in said bank owned by this complainant, and that the said John M. Smith made no investment of the said sums and wilfully failed and neglected to invest the same, and that he mingled them with his own funds and used them as his own as this complainant avers on information and belief; that the said John M. Smith did not charge himself, as guardian, with any interest or allow or ever pay any interest at all to this complainant for the use of said moneys for the period from said 14th day of June, 1899, to the 11th day of December, 1900; that on the said 11th day of December, 1900, the said John M. Smith procured from the said District Court, or the Judge thereof, an alleged order purporting to give authority to the said John M. Smith to borrow from himself as guardian the sum of eighty-two thousand dollars ($82,000.00) at the rate of three per cent per annum; that thereafter, in rendering his accounts as guardian, the said John M. Smith charged himself with interest on what he claimed to be the balance thereof, but on no other sum at the rate of three per cent per annum.

IV.

Complainant alleges that he is advised and believes and he charges that the said order was void and made without authority of law, and this complainant further avers and charges, on his information and belief, that the said order was fraudulently obtained and is

void and was a fraud upon said Court and upon this complainant in this, to wit, that the said John M. Smith had already appropriated the said moneys to his own use and did not, at that time, have the same in his possession, but that he concealed this fact from the Court; that no notice of the application for said order was given to anyone or in any manner; that the application, as appears from the records of this court, and from the said order, was one for authority to borrow the money in his hands; that according to the terms of the order and as recited in said application, it was represented to the Court that he had the moneys in his hands and that it would be a fair and safe investment to [5] allow him to borrow the said funds; that the alleged order of the Court is in words and figures as follows, as entered upon the minutes of the court for the 11th day of December, 1900:

"PROBATE MINUTES, DECEMBER, 1900.

Tuesday, the eleventh day of December, 1900.

255.

Estate and Guardianship of WM. SMITH et al., Minors.

Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the Court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about $82,000 at the rate of three per cent per annum.

The Court being fully advised in the premises: It is Ordered that said guardian be authorized to borrow said sum of $82,000 at the rate of 3% per annum, and to so hold the same at said interest until the further order of this court.

Order allowing guardian to use money of Estate, signed and filed.

F. K. ARMSTRONG,
Judge."

V.

And said complainant avers and charges, upon his information and belief, that no bond was required or given by the said John M. Smith as borrower; that the bond which he had previously given as guardian did not cover any liability as borrower; that 3% was not a fair or reasonable rate of interest for the said John M. Smith to allow or to be charged against him; that the prevailing rates of interest at the time were from 9% per annum, upwards; that the said John M. Smith was paying to the Union Bank & Trust Company of Helena interest at the rate of 9% per annum on a credit [6] which he had obtained at said bank, and which he paid off with the moneys of said minors and in particular said complainant, as aforesaid; that this sum of eighty-two thousand one hundred seventy-four and 20/100 Dollars ($82,174.20) which he had received from the executor of the estate of William A. Smith, deceased, as aforesaid, represented part of the payment made by said J. M. Smith himself for property which had belonged to the estate of William A. Smith, deceased, and which had been sold by said executor to the said John M. Smith himself.

That the latter for the purpose of making payment to the executor had borrowed money and had obtained a credit at the said Union Bank and had turned in the funds received from the executor to the said bank and Trust Company in payment of said indebtedness, as this complainant avers on his information and belief; that notwithstanding the making of said order and the attempt thereby to change the position of the said John M. Smith into that of borrower, he continued to act as guardian of the said minors and of this complainant.

That on the 1st day of December, 1906, an account purporting to be the final account of the said John M. Smith, as guardian of said William Smith, was filed in this court; that it appears from said account that John M. Smith was at that time absent from the State of Montana, and that the said account was verified by the said N. B. Smith, who purported to act on behalf of said John M. Smith and as his attorney; that a copy of said account is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint.

That this alleged final account purported to show all of the items of receipts and expenditures received and made by the said John M. Smith, as the guardian of this complainant, from June 14th, 1899, to the date of said account, both inclusive, and, therefore, to be a complete account of said guardian; that he had previously [7] filed some accounts, three in number, and the last of these in March, 1903, purporting to be annual accounts; that the alleged final account and all prior accounts filed by the said John M.

Smith were inaccurate, false and fraudulent in this, to wit, that he did not show that he had used himself and appropriated to his own use the money of the said minors and of this complainant, as aforesaid; that he allowed no interest at all on said money up to the 11th day of December, 1900; that thereafter he allowed only three per cent, and that on less than eighty-two thousand dollars; that he did not show any excuse for his not investing the said moneys as he should have done for the benefit of the minors, and particularly of this complainant.

VI.

And this complainant further alleges, on information and belief, that the said John M. Smith was and is chargeable with interest at the rate of eight per cent per annum, compounded annually, on the moneys received by him as guardian of this complainant, and that he was, at the time of his death, indebted to complainant for interest as aforesaid, and that his estate is now indebted to complainant for the sum of seventeen thousand fifteen and 23/100 dollars ($17,015.23) for the true balance due to this complainant for moneys received on his account by said John M. Smith, as guardian, upon the proper charge and the proper calculation of interest, as aforesaid, up to the 14th day of June, 1908, and in addition thereto, interest thereon at the rate of eight per cent per annum from June 14, 1908.

That a statement of the items of receipts and expenditures and of interest particularly chargeable to and due from said John M. Smith and his estate to the complainant is as follows:

"Amount received by John M. Smith as guardian of William Smith on June 14, 1899	$27,390.06
Less credit on same day	433.33
	26,956.73
Interest to June 14, 1900	2,156.53

[8]

Rest on June 14, 1900	$29,113.26
Interest to June 14, 1901	2,329.06
Less credits during year	437.00
Balance interest to June 14, 1901	1,892.06
Rest on June 14, 1901	31,005.32
Interest to June 14, 1902	2,480.42
Less credits during year	483.60
Balance interest to June 14, 1902	1,996.82
Rest on June 14, 1902	33,002.14
Receipts during year	175.00
Total on June 14, 1902	33,177.14
Interest to June 1, 1903	2,653.17
Less credits during year	931.54
Balance interest to June 14, 1903	1,721.63
Receipts during year	145.83
	1,867.46

Rest on June 14, 1903	35,044.60
Interest to June 14, 1904	2,803.56
Less credits during year	824.85
	1,978.71
Receipts during year	87.51
Rest on June 14, 1904	37,110.82
Interest for four days	32.00
Total	37,142.82
Less credit on same date	150.00
Balance on June 18, 1904	36,942.82
Interest to September 8, 1904	664.20
Receipts to same date	29.16
Balance on September 8, 1904	37,686.18
Less credit on September 8, 1904	708.05
Balance on September 8, 1904	36,978.13
Interest to October 6, 1904	226.00
Balance on October 6, 1904	37,204.13

[9]

Amount brought forward	$37,204.13
Less credit on same date	285.15
Vakabce ib October 6, 1904	36,918.98
Interest to June 14, 1905	2.030.59
Receipts during year	58.33

Total principal and interest to date..	39,007.90
Less credits during year	461.70
Rest on June 14, 1905	38,546.20
Interest to June 14, 1906	3,083.69
Receipts during year	58.33
Total balance interest and principal and receipts	41,688.22
Less credits during year	1,336.85
Rest on June 14, 1906	40,351.37
Receipts to August 21, 1906	58.34
Interest to August 21, 1906	601.12
Balance on August 21, 1906	41,010.83
Less credits	1,000.00
Balance August 21, 1906	40,010.83
Interest to October 25, 1906	569.40
Total to October 25, 1906	40,580.23
Less credits	1,400.00
Balance on October 25, 1906	39,180.23
Interest to November 30, 1906	308.88
Total to November 30, 1906	39,489.11
Less credits November 30, 1906	512.50
Balance on November 30, 1906	38,976.61
Interest to December 15, 1906	129.50

Total to December 15, 1906	39,106.11
Less credit on December 15, 1906	23,954.01
Balance on December 15, 1906	15,152.10
Interest to June 14, 1907	602.75
Rest on June 14, 1908	17,015.23

[10]

with interest at the rate of eight per cent per annum from June 14th, 1908.

That in the foregoing statement, the said John M. Smith is charged with moneys upon the debts as shown in his account and moneys received by him as such guardian; that wherever any payment made by the said John M. Smith exceeds the interest thus charged by him, as aforesaid, the same is credited to the principal, otherwise the payment is credited on account of interest, but that interest is only compounded annually.

VII.

And this complainant further alleges, on his information and belief, that the said John M. Smith never did obtain a discharge from said Court, and that he died without having obtained any discharge; that this complainant was not present or represented in any manner at the alleged settlement of the final account or of any other account filed by the said John M. Smith in the matter of said guardianship, and that he had no notice or knowledge thereof at the time.

That upon attaining his majority he received from the said John M. Smith the balance which the latter

acknowledged due to him, but that this complainant had then just come of age; that he had no business experience, no knowledge of business or legal matters, had no independent advice and trusted entirely to the said John M. Smith and to his attorney, N. B. Smith; that he had no knowledge that the moneys had been used by the said John M. Smith prior to the 11th day of December, 1900, without any authority and without allowing any interest thereon, and that all he knew about the subsequent use of the money and the allowance of interest was that he was told by them that the Court had allowed and directed the borrowing of this money and the allowance of three per cent interest by the said John M. Smith; that he did not know or understand at the time and had no reason to believe, as far as his information or understanding [11] went, that any fraud had been committed upon him or upon his sisters, and that he did not discover or learn of the fact until the month of August, 1907.

VIII.

And this complainant further avers, on his information and belief, that this claim is not outlawed or affected by the statute of limitations or any other limitation.

That said John M. Smith died on the 6th day of October, 1908, at Battle Creek, Michigan; that he left a will, by virtue of which his widow, Mary M. Smith, was named as executrix of his will; that the said will was duly admitted to probate in the District Court of the then Tenth Judicial District of the State of Montana, in and for the County of

Meagher, and that the said Mary M. Smith was then and there appointed executrix; that her appointment as such took place on the 7th day of November, 1908; that shortly thereafter she duly qualified as such, and that ever since then she has been, and now is, the duly qualified and acting executrix of the said will; that said estate is still undistributed.

That between the date of the majority of this complainant and the date of the death of the said John M. Smith, the latter was absent a great part of the time from the State of Montana, and that the said Mary M. Smith has been absent from the State of Montana a great part of the time since her appointment as executrix, and that by reason of their absences and the deduction of the time provided by law in such cases, the statute of limitations has not run against this claim, as this claimant avers on his information and belief.

That said Mary M. Smith is now, and for a long time prior hereto has been, absent from the State of Montana, as this complainant avers on his information and belief; and this complainant avers that he has not been guilty of any laches in this matter; that his failure to present a claim sooner against the estate was due to the fact that he believed that he had a good cause of action to set aside the sale of the property made to the said John M. Smith by the executor of the [12] estate of William A. Smith aforesaid; that he did bring a suit for the said purpose within one year after his majority, to wit, in the month of August, 1907, and that the said suit was pending in the courts of this State until the 14th

day of November, 1912; that said suit has been dismissed.

IX.

That on the 14th day of March, 1913, this complainant caused to be duly exhibited and presented a claim against the estate of said John M. Smith, containing all the facts and matters hereinbefore set forth, and the full particulars of said claim, as stated herein, and that therein and thereby he claimed to be due to him the sum of seventeen thousand fifteen and 23/100 dollars ($17,015.23), with interest thereon at eight per cent per annum from June 14, 1908.

That said claim was supported by the affidavit of the claimant, to wit, of this complainant; that the amount thereof was justly due; that no payments had been made thereon, which were not credited, and that there were no offsets to the same, to the knowledge of said affiant.

That the said defendant, in her notice to creditors, designated the office of N. B. Smith, an attorney at law, of White Sulphur Springs, in the State of Montana, as the place at which claims against the estate should be presented, and that said claim of this complainant was duly presented in and at said office and delivered to said N. B. Smith personally, that said N. B. Smith is also the attorney for said estate and for said defendant, as executrix of said estate.

That more than ten days have elapsed since said presentation; that said claim, as *complaint* alleges on his information and belief, has been disallowed

by said defendant, that is to say, that the said defendant did not, within the ten days following the day of the presentation thereof, endorse thereon either allowance or rejection of the same, and that complainant has elected to regard the same as [13] having been rejected; that three months have not elapsed since the presentation of said claim.

X.

And the complainant offers to account fully, on his part, for everything that he has received from said John M. Smith, or that he may be chargeable with, and he is ready and willing, and hereby offers to do and submit to everything that may be equitably required of him in the premises.

WHEREFORE, the complainant prays:

1. That the order made in the matter of the estate of said William A. Smith, Deceased, on the 11th day of December, 1900, and alleged in the foregoing complaint, be set aside or declared to be and to have been of no force or effect;

2. That all and every of the orders purporting to settle or allow any account or accounts of said John M. Smith, as guardian of said complainant, be set aside or declared to have been and to be of no force or effect;

3. That any receipts or acquittances that may have been given by this complainant to the said John M. Smith be also declared to be of no force or effect;

4. That the accounts of the said John M. Smith, as guardian of this complainant, with said complainant be re-opened;

5. That a new account of the guardianship of this

complainant by the said John M. Smith and of the administration by the latter of the guardianship funds and of all moneys and property that came into his hands or under his control, by reason of said guardianship be taken and settled between the complainant and the defendant herein as executrix;

6. That in such account said John M. Smith and the defendant, as his representative, be charged with interest on all moneys received by said John M. Smith, as guardian, and on all moneys for which he was accountable, as such guardian, at the rate of eight per cent per annum compounded annually, and that complainant have and recover [14] from the defendant, as executrix, the balance found due on such account, with interest thereon, to wit, the sum of seventeen thousand fifteen and 23/100 dollars, at the rate of eight per cent per annum from June 14, 1908, or such sum as may be found due;

7. That meanwhile and pending this suit, the defendant be enjoined from closing up or distributing or disposing of the estate or property of the said John M. Smith;

8. That complainant have such further or other relief as may be proper and agreeable to equity.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Complainant. [15]

Exhibit "A" [to Bill of Complaint].

In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate and Guardianship of WILLIAM SMITH, Minor.

John M. Smith in Account with said Ward.

Date.		Cash Received.	Amount.
1899.			
June	14.	To ⅓ of $82170.20—amt. received from N. B. Smith, Executor of Estate of William A. Smith, deceased.....	$27390.06
1901.			
Sept.	13.	To ⅓ of $2426.10—amount interest on $80870.20 loan at 3% from Dec. 1900 to Dec. 11, 1901, as per order of Court.....	808.70
		To ⅓ of $437.50—amt. of dividends 14, 15, 16, 17 from Stock of First National Bank of White Sulphur Springs, Montana	145.83
1902.			
Nov.	21.	To ⅓ of $2456.16—amt. of interest on $81872.00, loaned 3% from Dec. 11, 1901, to Dec. 11th, 1902, as per order of court.....	813.72

Jan.	8.	To ⅓ of $87,500 Dividend No. 18 from stock of First National Bank, White Sulphur Springs, Montana	29.17
July	5.	To ⅓ of $175.00—Dividend No. 19 from stock of First National Bank, White Sulphur Springs, Mont.....	58.33
1904.			
Aug.	25.	To ⅓ of $4395.80—being interest on $81762.05 amt. loaned at 3% from Dec. 11, 1902 to Aug. 26, 1904, as per order of Court.....	1465.27
[16]			
1903.			
Jan.	3.	To ⅓ of $262.50, Dividend No. 19 (a) from stock of First National Bank, White Sulphur Springs, Mont.....	87.50
		Amount Brot. forward...$30803.58	
1903.			
July	27.	To ⅓ of $87.50 Dividend No. 20, stock of First National Bank, White Sulphur Springs, Montana	29.17
July	27.	To ⅓ of $87.50 Dividend No. 21, Stock of First National Bank, White Sulphur Springs, Montana	29.17

1904.			
Jan.	5.	To ⅓ of $87.50, Dividend No. 22, Stock of First National Bank, White Sulphur Springs, Montana	29.17
Aug.	26.	To ⅓ of $87.50—Dividend No. 23, Stock of First National Bank, White Sulphur Springs, Montana	29.16
1905.			
Jan.	3.	To ⅓ of $175.00—Dividend No. 24, from Stock of First National Bank, White Sulphur Springs, Montana....	58.33
July	7.	To ½ of $58.33—Dividend No. 25, from Stock of First National Bank, White Sulphur Springs, Montana....	29.16
1906.			
Jan.	20.	To ½ of $58.33—Dividend No. 25, from Stock of First National Bank, White Sulphur Springs, Montana	29.17
July	7.	To ½ of $116.67—Dividend No. 27, Stock of First National Bank, White Sulphur Springs, Montana	58.34
Nov.	30.	To ⅓ of $5469.97—being interest on $8063.97, loaned at 3% from Aug. 26, 1904, to Nov.	

[17]

		30th, 1906, as per order of court	1833.32
		Total Receipts	$32918.57
Date.		Cash Paid Out Voucher.	Amount.
1899.			
June	14.	Amt. for education and maintenance of ward for year ending June 14, 1900	400.00
"	"	Amt. paid Max Waterman Atty. fee	33.33
1900.			
Oct.	9.	By ⅓ of Amt. expended for education and maintenance of Wm. Smith, Anna Maud Smith and Nellie May Smith, minors and wards of said guardian, viz.: $300.00	100.00
Dec.	8.	By ⅓ of $6.00, amt. expended for photos of grave of W. A. Smith, deceased, father of said minors	2.00
1901.			
March	30.	By ⅓ of $400.00, amt. expended for education and maintenance of above minors	133.33
May	15.	By ⅓ of $600.00, amt. expended for education and maintenance of minors above named	200.00
June	3.	By ⅓ of $5.00, amt. expended	

		for fixing grave of W. A. Smith, deceased	1.67
July	18.	By ⅓ of $50.00, amt. of attorneys fees paid Max Waterman.....	16.67
Aug.	19.	By ⅓ of $400.00, amt. expended for education and maintenance of minors above named.....	133.33
Sept.	13.	By ⅓ of $100.00, amt. of attorney's fee paid N. B. Smith..	33.33
[18]			
Sept.	13.	By ⅓ of $80 cost of drafts to Mrs. Reynolds	.27
Dec.	24.	By ⅓ of $400.00, amt. ex. pended for education and maintenance of minors above named....	133.33
1902.			
April	5.	By ⅓ of $400.00, amt. expended for education and maintenance of minors above named.....	133.33
April	5.	By ⅓ of $15.00, amt. expended for marking tomb of W. A. Smith, deceased, father of minors.....	5.00
Mar.	4.	By ⅓ of $100.00 amt. of attorney's fee paid N. B. Smith..	33.33
		Amt. Brot. forward.....	$1358.92

1902.			
Aug.	4.	By ⅓ of $400.00, amt. expended for education and maintenance of minors above named.....	133.34
Sept.	2.	By ⅓ of $800.00, amt. expended for education and maintenance of minors above named.....	266.67
"	"	By ⅓ of amt. expended for traveling expended of minors above named to Boston, Washington, etc., amt. expended $392.61.....	130.87
Oct.	15.	By ⅓ of $95.00, amt. expended for education and maintenance of minors above named.....	31.67
Dec.	19.	By ⅓ of $400.00, amt. expended for education and maintenance of minors above named....	133.33
1903.			
Jan.	3.	By ⅓ of $55.00, amt. expended for education and maintenance of minors above named.....	18.33
"	9.	By ⅓ of #145.00, amt. paid William Scott for repairing monument, W. A. Smith, Deceased.....	48.33

April	4.	By draft Mrs. D. B. Reynolds bill of minors.....	100.00
May	2.	By draft to minor to settle bills.....	64.00
Aug.	19.	Check to minor to settle bills..	30.00
Aug.	17.	By check to minor to settle bills.....	50.00
[19]			
Aug.	19.	By draft Mrs. D. B. Reynolds $150.00 settle board bill minor.....	150.00
Oct.	22.	By draft to minor settle bills.	75.00
Dec.	18.	By draft to minor.....	100.00
1904.			
Feb.	13.	By draft to minor settle bills..	119.85
April	22.	By draft to Mrs. D. B. Reynolds settle bill of minor...	150.00
May	5.	Draft minor trip to Montana.	110.00
June	18.	By draft Mrs. D. B. Reynolds bill of minor.....	150.00
July	23.	Check settle minors bills.....	196.20
Sept.	8.	By check Wm. Smith, minor, school purposes.....	500.00
Sept.	8.	By check H. E. Marshall, bills minor.....	11.85
		Total.....	$3,968.36
1904.			
Oct.	6.	By draft for Shattuck School for minor No. 1.....	285.15
Aug.	31.	By check to minor No. 2.....	5.00

Nov.	19.	By draft to Shattuck School for minor No. 3.....	50.00
"	19.	By check E. G. Hartfield Tel. for minor No. 4.....	1.10
Dec.	10.	By check to minor school purposes No. 5.....	150.00
	1905.		
Jan.	11.	By check minor school purposes No. 6.....	60.10
Jan.	11.	By draft Jas. Dobbins for minor No. 7.....	50.00
Feb.	14.	By draft Mrs. Reynolds, minor's bill No. 8.....	75.00
April	21.	By check telegrams, for minor No. 9.....	2.50
May	4.	By draft Mrs. D. B. Reynolds minor's bill No. 10.....	68.00
Sept.	18.	By cash to minor school purposes No. 11.....	40.00
Sept.	25.	By check school purposes No. 12.....	310.00
Nov.	9.	By cash paid telegram from minor.....	1.85
Oct.	9.	By check paid minor school purposes No. 13.....	70.00
Nov.	28.	By check paid minor school purposes No. 14.....	85.00
[20]			
Dec.	16.	By check paid minor school purposes No. 15.....$	35.00

"	29.	By check paid minor school purposes No. 16.....	25.00
"	29.	By check paid minor school purposes No. 17.....	175.00
"	29.	By check to Smith Bros. Sheep Co. loan No. 18.....	10.00
1906.			
Feb.	16.	By check to minor for school purposes No. 19.....	100.00
Feb.	27.	By check to minor for school purposes No. 20.....	85.00
Mar.	26.	By check to minor for school purposes No. 21.....	75.00
April	12.	By check to minor for school purposes No. 22.....	25.00
"	30.	By check to minor for school purposes No. 23.....	75.00
June	1.	By check to minor for school purposes No. 24.....	225.00
June	10.	By check to minor for school purposes No. 25.....	150.00
Aug.	4.	By check to minor for school purposes No. 26.....	150.00
		By check for school purposes and to pay debts No. 27.....	700.00
Oct.	23.	By check for school purposes and to pay debts No. 28.....	300.00
"	25.	By cash advanced minor for school purposes and to pay debts No. 29.....	1100.00
Nov.	30.	By 1/3 of $787.50, cost guardian's bond for 7 years No. 30.	262.50

"	30. By N. B. Smith, attorney's 4½ years. No. 31.....	250.00
	Total	$8964.56

SUMMARY.

Total amount of cash received by Guardian.....	$32918.57
Total amount of cash paid out by Guardian.....	8964.56
Balance on hand.....	$23954.01

LIST OF PROPERTY OWNED IN COMMON, BY WILLIAM SMITH, ANNIE MAUD [21] SMITH, AND NELLIE MAY SMITH, AS SHOWN BY THE INVENTORY OF ESTATE OF SAID MINORS.

17½ Shares of the Capital Stock of the First National Bank of White Sulphur Springs, Montana.

10,000 Shares of Stock of the Satellite Mining Company.

187,500 Shares of the Capital Stock of the Black Hawk Mining Company.

190,500 Shares of the Capital Stock of the Alice Mining Company.

Said ward, William Smith, owns an undivided one-third interest in the above-described personal property.

An undivided one-half interest in eight town lots in Higgins Townsite of White Sulphur Springs, Montana, being Lots 20 and 21 in Block 22; and Lots 1, 2 and 3 in Block 30; and Lots 13, 14 and 15 in Block 11.

An undivided one-half interest in two town lots, in Park Addition to the City of Livingston, Montana, being Lots 8 and 25 in Block 22, according to the plat filed in the office of the recorder of Deed in Gallatin County.

Said ward, William Smith, has an undivided one-sixth interest in the above-described real property. All vouchers, the numbers of which are omitted in the foregoing account, were filed with the several annual accounts, in the Matter of the Estate and Guardianship of William Smith, Annie Maud Smith, and Nellie May Smith, minors of record in this Court.

[Indorsed]: Title of Court and Cause. Bill of Complaint. Filed May 17, 1913. Geo. W. Sproule, Clerk. [22]

Thereafter, on July 11, 1913, an alias subpoena in equity was duly issued herein, which said subpoena with proof of service thereof is in the words and figures following, to wit: [23]

Alias Subpoena.

UNITED STATES OF AMERICA.

District Court of the United States, District of Montana.

IN EQUITY.

The President of the United States of America, Greeting: To Mary M. Smith, as Executrix of the Will of John M. Smith, Deceased, Defendant.

You are hereby commanded, that you be and ap-

pear in said District Court of the United States aforesaid, at the courtroom in Federal Building, Helena, Montana, on the 31st day of July, 1913, to answer a Bill of Complaint exhibited against you in said court by William Smith, complainant, who is a citizen of the State of California, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

WITNESS, the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 11th day of July, in the year of our Lord one thousand nine hundred and thirteen, and of our Independence the 137.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT U. S.

You are hereby required, to file your answer or other defense in the clerk's office of said court on or before the twentieth day after service, excluding the day thereof; otherwise the bill may be taken *pro confesso.*

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

C. B. NOLAN and
WM. SCALLON,
Solicitors for Complainant, Helena, Montana.

United States Marshal's Office,
District of Montana.

I hereby certify, that I received the within writ on the 14th day of July, 1913, and personally served the same on the 15th day of July, 1913, by delivering to, and leaving with Mary M. Smith, as executrix of the will of John M. Smith, deceased, said defendant named therein, personally, at 4½ miles west of Martinsdale, in the county of Meagher, in said district, a copy thereof.

WILLIAM LINDSAY,
U. S. Marshal.
By Thad C. Pound,
Deputy.

Helena, July 17th, 1913.

[Endorsed]: No. 5. U. S. District Court, District of Montana. In Equity. Wm. Smith vs. Mary M. Smith, as Executrix. Alias Subpoena. Filed July 24th, 1913. Geo. W. Sproule, Clerk. By ————, Deputy Clerk. **[25]**

Thereafter, on July 30, 1913, defendant's answer was duly filed herein, in the words and figures following, to wit: [26]

In the District Court of the United States, in and for the District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Estate of JOHN M. SMITH, Deceased,

Defendant.

Answer.

Comes now the said defendant and for answer to the bill of complaint herein:

I.

She, said defendant, avers that she is without knowledge as to whether complainant is or was at any time therein stated a citizen and resident of the State of California.

II.

Said defendant admits so much of the paragraph III of said bill of complaint as is contained on line 25 of page 1 of said bill of complaint down to line 13 on page 2 thereof, but she denies that the testator, John M. Smith, appropriated or converted all or any moneys of the complainant to his own use, or that he did not invest or otherwise properly handle any moneys held by him as guardian, either wilfully or otherwise, or that he retained or converted any in-

terest in such moneys, or that he received, or converted to his own use any dividends or other moneys, or that he as guardian failed to charge himself as such guardian with any and all moneys belonging to the said complainant. She admits that on, to wit, the 11th day of December, 1909, a certain order was made and entered in and by the Dictrict Court of the (then) Ninth Judicial District of the State of Montana, in and for the County [27] of Meagher, wherein the matter of the guardianship of said complainant was then pending, wherein and whereby the said John M. Smith, as guardian, was authorized to lend to himself individually the sum of $82,000.00 at the rate of 3 per cent per annum, but she avers and alleges that said order was by said court duly made and entered in exercise of the power and discretion of said court in said guardianship matter; and she admits that from and after the rendition and entry of said order the said John M. Smith in pursuance thereof received the moneys therein mentioned and charged himself and credited the said complainant with the moneys and interest as therein he was ordered to do.

III.

Defendant admits that the copy of the order contained in paragraph IV of said bill of complaint is correct, but she denies that the same was void or made without authority of law; denies that it was fraudulently obtained or that it was a fraud upon the Court; denies that when it was obtained or at all the said John M. Smith had appropriated any moneys to his own use, or that he did not have it in

his possession, but, on the contrary, she avers and alleges that all the facts and circumstances of the guardianship matter therein referred to were fully and truthfully represented and made known to the Court and that it was fully informed and apprised of the same, and acted upon such knowledge in the rendition and making of said order.

IV.

That as to the matters and things contained in paragraph V of said bill of complaint, and particularly those contained on page 4, lines 24 to 33, and page 5, lines 1 to 18, this defendant is informed and believes and so alleges that the bill of complaint is insufficient of fact to constitute a valid cause of action in equity, and in accordance with Equity Rule [28] 29, of this Court, she prays the judgment of this Court thereon.

In further answer to said paragraph V, this defendant admits the filing of the final account as therein stated, but denies that the same was in any respect inaccurate, false, or fraudulent, or that it does not fully and truthfully set forth and represent the state of the account from said John M. Smith to said complainant; and defendant further avers that said final account came on duly to be heard by the said District Court; that said Court on, to wit, the —— day of ————, 19——, duly gave and made its order and judgment settling, approving and allowing the same, and did also duly give, and make its order and judgment discharging the said John M. Smith from any and all liability, duty and responsibility in and about his guardianship of the person

and estate of said complainant, of all of which he had full notice and knowledge, and that no appeal has ever been taken therefrom.

V.

As to matters set forth in paragraph VI of said bill of complaint, this defendant denies that her said testator or his said estate was or is chargeable with the sum therein mentioned, or in any sum, either by way of interest or otherwise, to complainant.

VI.

This defendant denies that said John M. Smith was not discharged from the guardianship referred to in paragraph VII of said bill of complaint; denies that said complainant was not represented at the settlement of the said guardianship's accounts; and denies that he had no notice or knowledge thereof. Defendant avers that she is without knowledge as to whether complainant was ignorant of business or legal matters at the time he and his said guardian, John M. Smith, had their final accounting and settlement; denies that he was not fully informed at the [29] time of such settlement of the matters and things had and done during the course of such guardianship; and denies that any fraud had ever been committed upon him by the testator of the defendant.

VII.

To paragraph VIII of the said bill of complaint this defendant on her information denies that the claim, if any he has, of complainant is not outlawed or affected by the statute of limitations or any other limitation, but, on the contrary, she avers that such claim is barred by the provisions of subdivision 4 of

section 6449, and of section 6451 of the Revised Codes of Montana, and by reason of the failure of complainant to present his alleged claim, duly verified, to this defendant as the executrix of the estate of John M. Smith, within the period of publication of notice to creditors, which notice was duly given and published in pursuance of Section 7522 of the Revised Codes of Montana, beginning on the 18th day of December, 1908, as required by the statutes of the State of Montana in that behalf, said claim, if any, became and is barred.

Defendant admits so much of said bill of complaint as is contained in paragraph VIII, in lines 8 to 18, inclusive, of page 10 thereof; but she denies that her testator, John M. Smith, was absent from the State of Montana for a great part of the time, or that he was absent therefrom save temporarily; and she denies that she, since her appointment as executrix, as in said paragraph alleged, has been absent from the State of Montana for a great part of the time, or otherwise than temporarily; and she avers and alleges that in the said notice to creditors, the office of N. B. Smith, attorney at law, who was the attorney for defendant and of said estate, at White Sulphur Springs, County of Meagher, State of Montana, was designated as the place for creditors [30] of and claimants against said estate to present and exhibit their claims against said estate, and that there has been no time during the said period of publication when said complainant could not have presented and exhibited any claim he might have had against said estate for allowance or rejection as is provided for

in the Statutes of the State of Montana in that behalf; defendant denies that she is absent from the State of Montana, and avers that she is without knowledge of complainant's reason for his failure to present and exhibit any claim he might have had against said estate for rejection or allowance, and as to the matters and things in said paragraph set forth she is informed and believes, and so alleges that the said bill of complaint is insufficient in fact to constitute a valid cause of action in equity, and in accordance with Equity Rule 29 of this Court, she prays the judgment of this Court thereon.

VIII.

Defendant denies that complainant ever duly exhibited or presented any claim against the estate of said John M. Smith, and she admits that whatever he did in that regard was and is as set forth in paragraph IX of said bill of complaint, but as to the same she is informed and believes and so alleges that the said bill of complaint is insufficient of fact to constitute a valid cause of action in equity, and in accordance with Equity Rule 29 of this Court, she prays the judgment of this Court thereon.

IX.

And for further answer and defense to the bill of complaint herein this defendant does aver and allege that heretofore, to wit, on the 15th day of September, 1911, in an action then pending in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher between the said William Smith, plaintiff, and said Mary M. Smith, [31] as executrix of the estate of John M.

Smith, deceased, defendant, and wherein was involved, brought into question, determined and adjudicated the same matters and things and pretended cause of action as are set forth in the bill of complaint herein, judgment was duly given and made by said Court in favor of the defendant and against the said plaintiff that the said complainant recover nothing by reason of his action and that defendant have judgment against the said complainant for costs and disbursements amounting to the sum of $7.50; that thereupon the said complainant duly prosecuted an appeal from said judgment to the Supreme Court of the State of Montana, in which last named court such further proceedings were had and done that on, to wit, the 10th day of June, 1912, judgment was by said Court duly given and made that said judgment of said District Court be and the same was duly affirmed; and on, to wit, the 14th day of November, 1912, a petition for a rehearing, which was by said complainant filed and presented in said cause in said Supreme Court, was by the said Court overruled and denied.

X.

And for further answer and defense to said bill of complaint this defendant does aver and allege that the said complainant attained the age of twenty-one years on, to wit, the 10th day of October, 1906, and that any cause of action which he might have had against the said John M. Smith or against his estate is barred by the provisions of subdivision 4 of section 6449 and section 6451 of the Revised Codes of the State of Montana of 1907, and that said cause of

action did not accrue within five years of the commencement of the present action, to wit, the 17th day of May, 1913.

XI.

And for further answer and defense to said bill of complaint this defendant does aver and allege that the John M. [32] Smith mentioned and referred to in said bill of complaint died on the 6th day of October, 1908; that at the time of his death he was a citizen of the State of Montana and a resident of the county of Meagher therein; that he left a last will and testament, wherein this defendant was named and designated as executrix, which will was duly admitted to probate by the District Court of the Tenth Judicial District of the State of Montana in and for the County of Meagher, which Court had jurisdiction of said estate; that upon the 7th day of November, 1908, by the order and judgment of said Court duly made and given in the matter of said estate, letters testamentary were duly issued to this defendant, and she qualified as executrix of said will and of said estate and her appointment as such executrix has never been revoked, and she has been since then and is now the duly appointed, qualified and acting executrix of said will and of said estate; that in pursuance of Section 7522 of the Revised Codes of the State of Montana of 1907, and as such executrix, she caused notice to be given and published to all persons having claims against said estate to present and exhibit the same with the necessary vouchers, as required by the laws of said State, and in said notice the office of N. B. Smith, at the town of White Sulphur Springs,

Meagher County, Montana, was designated as the place where said claims might be presented and exhibited, the said N. B. Smith being an attorney at law and being the attorney of said executrix and of said estate; that said notice to creditors and claimants was, in accordance with the order of said Court in that behalf, duly published in the Meagher County Republican, that being a newspaper of general circulation, regularly published and issued at said White Sulphur Springs, in said county of Meagher, and being the newspaper designated by said Court for said purpose, for not less than once a week for more than four weeks, the first publication [33] thereof being in the issue of said newspaper of December 18th, 1908, and the time expressed in the said notice being ten months after the first publication thereof, said estate exceeding in value the sum of ten thousand dollars, as provided in section 7523 of the Revised Codes of Montana of 1907; that no claim of any kind of said complainant against said estate was presented or exhibited to her either in person or at the office of said N. B. Smith during such period of publication or at all, save that on March 14, 1913, and long after the expiration of said notice and publication, a claim was presented and exhibited as is alleged in paragraph IX of the bill of complaint; that such claim was rejected and disallowed, and this defendant does aver and allege on her information and belief that if the same ever had any validity the same is now barred as provided by sections 7525 and 7532 of the Revised Codes of the State of Montana of 1907, and complainant is precluded from further asserting or insisting

on the same; and that at the several times hereinbefore mentioned the complainant was a citizen and resident of the State of Montana, was present therein, and was fully aware of the matters and things herein averred, and there were no obstacles or reasons to prevent him from presenting or exhibiting any claim he might have had against said estate, as the statutes of Montana require.

Wherefore, having fully answered the bill of complaint herein, defendant prays to be hence dismissed, with her costs and disbursements in this behalf expended.

R. LEE WORD,
H. G. McINTIRE,
S. H. McINTIRE,
Solicitors for Defendant.

H. G. McINTIRE, of Counsel.

[Indorsed]: Title of Court and Cause. Answer. Filed July 30, 1913. Geo. W. Sproule, Clerk.

Service of the within Answer and receipt of a copy thereof this 30th day of July, 1913, is hereby admitted and acknowledged.

C. B. NOLAN,
WM. SCALLON,
Solicitors for Complainant. [34]

That the Statement of the Evidence herein, as approved by the Court and filed on April 22, 1914, is in the words and figures following, to wit: [35]

Statement of Evidence to be Included in Record on Appeal.

In the District Court of the United States, in and for the District of Montana.

WILLIAM J. SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

[Excerpt from Testimony of John M. Smith in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

On the trial of said cause the plaintiff introduced in evidence following from the testimony of John M. Smith, as found in the record on appeal to the Supreme Court of the State of Montana, in the case of William Smith, Plaintiff, vs. Mary M. Smith, as Executrix et al., Defendants:

The witness remembered that the executor turned the money over to him as guardian, but he cannot give the date. He did not advise or counsel with the executor, neither at the time or before or immediately after he received the money, as to what he was going to do with it. He and the executor had talked about putting the money in Government bonds if they sold the property. It was a poor plant to sell to an outside party. If he was guardian his intention was to place the money in Government bonds in order to take no chance of loss. The witness gave

the executor a receipt for the money when he received it. When the witness got the money he took it and paid off the notes he owed at the bank. He did not advise with N. B. Smith about that disposition of the money before he used it. The witness acted on his own judgment. N. B. Smith did not know the use the witness made of the money until quite a [36] while afterward. The witness stated his reasons for so using the money. He had given bonds for the safekeeping of that money and could have placed it in Government bonds, but thought he would just take the money and pay off these notes and pay interest just the same as Government bonds. At one time the witness thought of paying four per cent interest, but it was some time after that, probably fifteen or eighteen months, before the witness got the order he had applied for to pay three per cent, same as Government bonds. He learned for the first time on the trial that in the final settlement, interest had not been credited from the time the witness used the money, but only from the time the order was given.

The witness testified he had used the money turned over to him by N. B. Smith, when he was appointed guardian, to pay his notes at the bank. The money turned over was in the form of certificates of deposit. It wasn't counted out as cash. The certificates of deposit were turned over to him as guardian of the children of William Smith by the administrator. Witness turned them into the bank in payment of his note and thought he had a right to do so because he had given security for the amount. He understood

he was using money of minors for his own purposes; that he had a right to do so; that he did not talk with anyone about it; that as he had given security for that money, it was the same as though it was in his possession; that he may have made a mistake in so doing, but he did not do it with the intention of defrauding anybody. That he knew he was paying off his indebtedness and using the money of minors that he had given security for without asking anybody's permission; that he did not do it with the intention of defrauding anybody and that if he has wronged anybody in any way, he is willing to make it right. The witness thought this way at the time: That it was just the same if he put the money [37] in Government bonds if he paid the same interest. He acknowledged it may have been wrong, but he did not do it with the intention of defrauding anyone; that he paid off his note and that is the condition of things just as they were. If another party had bought and the money had been turned over to the witness he would have put it in Government bonds, that was his full intention; that he did not consider the question as to his willingness if an outsider had bought the stock of the minors, that they should simply give a bond and keep the money until the children became of age, or for any time. He did not think anything about it; that it might have been partiality on his part because he felt like paying off his notes. The witness thought that the money was lying there and that he would give security and that he would pay it back if it took the last dollar he had on earth. The witness arranged with the bank for a credit of

$90,000; certificates of deposits were issued to N. B. Smith, turned back to the witness and by him turned into the bank. All that the witness was out was the interest paid between the date of the issuance of the certificates up to the date when they were turned into the bank and the $85,000 he paid N. B. Smith. He paid N. B. Smith this through the bank. The witness received $82,000 from N. B. Smith and then the witness paid his notes and enough more to pay $85,000.

[Excerpt from Testimony of N. B. Smith, in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

The plaintiff introduced in evidence the following from the testimony of N. B. Smith in said cause of William Smith, Plaintiff vs. Mary M. Smith, as executrix, et al., Defendants:

Witness is shown Defendants' Exhibit No. 59, a certified copy of the bond given by John M. Smith as guardian of the three children of William A. Smith. It never occurred to the witness that the bond wasn't good as to money which might be borrowed by John M. Smith from the estate of his wards; that is a proposition of law, the condition of the bond is he shall faithfully execute his trust according to law. Witness knows of no other bond [38] filed in court by John M. Smith, as guardian of the children of William A. Smith. Witness was not attorney for John M. Smith when the bond was filed. Witness does not know of any bond John M. Smith filed as borrower. Witness does not know of any bond given to secure the repayment of the sum of $83,000 that

John M. Smith borrowed from the children's estate. Witness does not remember about getting the order of Court permitting the borrowing of the money. Order is in the handwriting of Mr. Badger, at one time Clerk of the Court. Witness does not know who paid the premium on the bond. The witness prepared the final account of John M. Smith, as guardian.

Attention of the witness was directed to Defendant's Exhibit 66, being a letter from the witness to the complainant, dated August 13, 1903. Witness says statement found in the letter that Uncle John gave a big trust company surety for the money which made everything safe and the Court gave him permission to use the money, provided he paid four per cent per annum on the same, was a mistake; that such a statement appears in the letter, above referred to; that the big trust company referred to was the Fidelity and Guaranty Company. The four per cent referred to in the letter is a mistake. Witness does not know how it occurred. He does not know how he could have gotten that into his head, except through this talk with Uncle John when he said he paid four per cent interest. This talk occurred in the office of the witness in White Sulphur Springs in the year 1899. He thought in the Fall of 1899. Over a year after that the order was made allowing John M. Smith to borrow the money, and that order provided for three per cent interest. Witness prepared final account and the various annual accounts from time to time, up to the end of the estate. He never allowed four per cent interest. [39] The witness

wrote to his aunt in October, 1899, that John M. was to pay four per cent interest and he must have had a talk before October, 1899, that John M. was to pay four per cent interest. That is the only way he can fix the date. Witness had no order to borrow this money in October, 1899. He had nothing to do with that part of it. He understood from John Smith that he was to pay four per cent interest. Witness did not prepare or procure the order providing for three per cent interest and the witness computed the interest according to the order. Witness has learned from John M. Smith in or before October that John M. Smith was using this money for his own purposes. Witness thinks John M. Smith told him of this; that this is his recollection. Witness thinks John M.'s memory is at fault when he says he never told anyone about using the money to pay off his own debts. Witness jogged John M. Smith up on the proposition that they had to pay the estate's interests and the witness made the mistake in telling Mrs. Moore, who is the person most interested.

Counsel for plaintiff also introduced in evidence pages 126 to 128, of appellant's brief in chief in the case of William J. Smith vs. Mary M. Smith, in the State Supreme Court, which pages are as follows:

[Excerpt from Appellant's Brief in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

If, however, the Court should find itself unable to agree with the counsel for appellant as in this brief set out, to such an extent at least as to move it to void the sale of the stock or to hold it to have been

made in trust, equity demands that in lieu of such relief, it requires the representative of John M. Smith to account for the use of the money of the appellant from the time he misappropriated it to the time of his alleged settlement with him. He does not claim such accounting specifically in his bill of complaint, because [40] relief of that character proceeds upon the basis of an affirmance of the sale. He could not make such specific claim and maintain his action. But the Court may properly say that it finds the sale itself not open to attack, but that in affirming it the guardian must be held answerable for interest on the moneys of the wards which he used to pay the notes he gave for the credit which enabled him to make the purchase, at the same rate that he would have been obliged to pay had he obtained it elsewhere.

Of course, accounting by fiduciaries of every character is a well-recognized branch of equity.

1 Ency. of P. & P. 96.

1 Cyc. 416–427.

John M. Smith was certainly under obligation, upon the most favorable view that can be taken either of the law or the facts of this case, to account to his wards for interest on $85,000 from June 17, 1899, when he actually appropriated their money to his own use, down to the time that he made settlement with them, respectively, at the current rate of interest, as against nothing to December 11, 1899, and three per cent annually thereafter, with annual rests as is expressly pointed out by the statute.

"A trustee must invest money received by him under the trust, as fast as he collects a sufficient sum, in such manner as to afford reasonable security and interest for the same."

Section 5396, Revised Codes.

"If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon, if such omission is negligent merely, and compound interest if it is wilful."

Section 5397, Revised Codes.

It certainly does little credit to his memory on the part of his heirs to resist such an account. It would have exhibited him in a better light than this record leaves him if on learning that the law exacted as much of him he had promptly [41] advised his counsel to consent to suffer a judgment for what was justly due from him to his nephew. The best terms he could make with the bank for the loan of the money to make the purchase was nine per cent. The undisputed evidence is that the going rate was from 10 to 12 per cent.

The appellant is not seeking such a judgment, but if he is not entitled to the relief he seeks, the undisputed evidence in the record, admitted without objection, shows that he is at least entitled to a decree of that character.

A decree affirming a sale made under circumstances such as are disclosed by this record would be an unfortunate invitation to all sorts of machinations for the acquisition of the property of orphans for selfish purposes, to the destruction of their heritage and the calamitous undermining of the homely virtue of common honesty.

[Excerpt from Respondent's Brief in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also part of respondent's brief in the same cause, beginning with the paragraph entitled "Accounting for Interest," found on pages 196 and 197 thereof, as follows:

The last three pages of counsel's brief urge that in this suit the Court dispose of this question, and criticises appellees for not offering to account therefor. Counsel admits that no such relief could be granted save upon the affirmance of sale and that it could not be sought by appellant because inconsistent with his present offer to annul the sale. It is impossible to conceive of relief founded on the theory of a valid sale in an action brought to avoid it. Had an attempt been made in the lower court to amend the action to one of accounting upon a valid sale, it could not have been done.

Kramer vs. Gille, 140 Fed. 682–83.

U. P. Ry. vs. Wyler, 158 U. S. 253.

Had this suit, as originally begun, been for the interest anterior to the court order authorizing the loan, no one can [42] doubt from John M.'s attitude upon the witness-stand that he would have directed his counsel to have admitted the mistake. Indeed, had appellant or his counsel when, as alleged in the complaint, the latter demanded a return of the stock, called attention to the mistake as to interest from June, 1899, to December, 1900, it would have been promptly paid. But this fact, within the knowl-

edge of appellant's agent, was withheld—possibly for its moral effect—and this action begun, charging criminal conspiracy to wrong these children and also embezzlement. And those charges, despite the compelling evidence to the contrary, are to-day urged by appellant before this court John M. neither committed nor confessed crime; and he could not in this action, grounded on such charges, do otherwise than resist recovery. His course of action cannot be outlined for him by those who are still seeking to blacken his memory by criminal accusation. When appellant abandons the charge of fraud, and embezzlement; confesses that the sale was a genuine sale in good faith for adequate value; and asks for interest during the accidentally omitted period, then those charged with the protection of the dead man's good name can recognize the mistake in accounting, without stain to his memory.

[Excerpt from Appellant's Brief on Petition for Rehearing in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also part of appellant's brief on petition for rehearing, beginning with the third line from the bottom of page 31 to page 38, inclusive, which is as follows:

But if the Court should feel constrained not to open the cause for further discussion on the voidability of the sale, if it should adhere to the conclusion that the sale should be affirmed, certainly it ought to give to the appellant the correlative relief to which he is confessedly entitled—an accounting for inter-

est unjustly withheld from him upon the settlement. [43]

Even the counsel for the respondents admit that interest should have been calculated in the settlement from June 17, 1899, instead of from December 11, 1900. Everybody concerned at the hearing admitted it and both John M. and N. B. asserted that the omission was an inadvertent mistake. One troubled with a suspicious mind would regard it as a strange mistake.

But let it be assumed that it was an honest mistake. The integrity of John M. will be best vindicated by "those charged with the protection of the dead man's good name" (Brief of Respondents, page 197), by a frank offer to allow judgment to be taken for such amount as upon an accounting it shall appear he ought to have paid, over and above what he did pay for the use of his ward's money.

In view of the eulogies paid by counsel for the respondents both in the brief and in the oral argument to John M. Smith, as a man of honor, and of honesty, nothing less can be expected of them.

In view of the grounds advanced by the Court in support of its conclusion, it will, the appellant believes, be pleased to require what equity and justice demanded of John M. Smith toward his nephew in the settlement with him.

It is insisted that equity and justice demanded that he pay just what he would have been obliged to pay anyone else,—namely, nine per cent.

Unquestionably either that rate or the legal rate should be made the basis of computation unless the

order fixing the rate at three per cent, is valid. That it is not, is indubitable upon the authorities referred to. And, of course, the oral consultation with the Judge has no efficacy whatever.

> "Conventions between the guardian and judge of the court preceding the investments, and verbal advice of the latter to make them, cannot be held to operate as orders and directions which the statute authorizes the court to make in the premises. [44] They may go to show the guardian's good faith, and the knowledge of the judge at the time of entering the orders of approval. But the advice of a judge given verbally under such circumstances is not to be regarded as tantamount to an order contemplated by section 4922."
>
> Nagle vs. Robins, 62 Pac. 154–157.

Dismissing, then, the order, the prevailing rate of interest, certainly nothing less than the legal rate, must be exacted. And the rule is universal that when the trustee uses the trust funds, annual rests may be made in the accounting with him.

Woerner on Guardianship, 67.

Berney vs. Saunders, 16 How. 533–542.

Under the authorities referred to, the guardian did not "invest" the funds and the statute requires him to return compound interest.

Civil Code, Section 3014.

Had he made annual reports as it was his duty to do, the interest accumulating annually would have gone into the annual balance and become a part of the principal for the succeeding year.

To the obtaining of this alternative relief a technical objection may, perhaps, be urged that the complaint does not ask for relief of that character, but it is scarcely to be believed that counsel, who so eloquently proclaim the virtue of their client, will care on his behalf, to interpose such a suggestion at this time.

And since the Court determines that the claim of the appellant is wanting in substantial merit, in the main, however it may be sustained by technical rules, it will hardly listen with patience to a technical objection urged by respondents to relief to which appellant is confessedly entitled.

The evidence is all in the record. It was admitted without [45] objection. The facts are all set out in the complaint. Some of them were unproven, the Court holds. But those upon which the alternative decree is asked are all admitted. By such a decree the Court says that the sale was not void, but by determining to effect the purchase in the way it was made, John M. Smith made himself liable for interest on the funds used by him and for the entire time he used them.

One of the purposes of the action was to annul the settlement made with appellant and to have the sale adjudged void because of the circumstances and conditions under which the stock was bought and paid for. The Court adjudicates, should it grant the alternative relief, that the settlement should be set aside, but that, in view of the circumstances under which the stock was bought and paid for, the further appropriate redress is an accounting for the

purchase money and interest from the time the guardian used it, that his use of it entitles the appellant not to overturn the sale, but to have interest at a proper rate and for the full period of its use.

It is true the relief now asked, should the Court eventually hold the sale to be valid, is not specifically prayed for in the complaint. But there is a prayer for general relief. Under this any appropriate decree may be awarded.

Merk vs. Bowery M. Co., 31 Mont. 308.

Indeed, the plaintiff in equity is entitled to any relief warranted by the facts, whatever his prayer may be.

State vs. Tooker, 18 Mont. 540.

Kleinschmidt vs. Steele, 15 Mont. 181.

Or though he had no prayer at all.

Custer County vs. Yellowstone County, 6 Mont. 39.

Even if amendment of the complaint in some particular might be desirable, the Court may permit the amendment or it [46] may, in its discretion, treat the pleading as having been amended.

1 Daniell's Chancery, page 418.

Fallon vs. Lawlor, 102 N. Y. 228.

Murray vs. Scribner, 43 N. W. 549.

Wilcox vs. Lasley, 20 Pac. 228.

Or if the Court finds any reason why that course should not be pursued, it may reverse with directions to the Court below to permit an amendment. This is often done when the Court finds that a demurrer was properly sustained or a nonsuit correctly granted, but it likewise appears that the plaintiff has

a cause of action if only his complaint contained the proper averments.

It is not at all uncommon for an appellate court, when the merits of a case appear to be with a complainant whose bill has been dismissed, to reverse the decree with directions to permit an amendment. Such a disposition was made of

Ruby vs. Atkinson, 71 Fed. 567.

The subject was considered and the practice vindicated in

Evans vs. Hughes, 54 N. W. 1049.

The opinion refers to many cases in which it was pursued. Most of these, perhaps, were appeals from orders sustaining demurrers, but judgment has been entered in the case of

Rigg vs. Parsons, 2 S. E. 81.

In that case the Court said:

> "If nothing else appeared in the judgment and order of the court below, we would, notwithstanding the fact that its ruling was not erroneous in sustaining the demurrer, reverse the judgment, and remand the case, with leave to the plaintiff to amend his declaration if he elects to do so, since we can plainly see that it could be amended so as to avoid this ground of demurrer. Baylor vs. Baltimore & O. R. Co., 9 W. Va. 270; Norris vs. Lewen, 28 W. Va. 336."

But the usual course was departed from because it appeared that the plaintiff had declined to amend. But even in such a [47] case the judgment was reversed with leave to amend in

Dist. of Columbia vs. Ball, 22 App. D. C. 543.

The Supreme Court of the United States has re-

peatedly acted in accordance with the procedure which it is insisted should be observed if the bill is believed to be defective, as is shown by the opinion in

Van Doren vs. Penn. R. Co., 93 Fed. 260.

In Scruggs v. Endom, 123 La. 887, the plaintiff was defeated because his testimony was excluded on an objection to the petition. The appellate court held that the objections urged were well taken, but refused notwithstanding to affirm the judgment and reversed it with directions to permit an amendment.

> "If possible, the Court must not allow justice to be defeated and wrong to triumph, by a mere mistake or unskillfulness in pleading. A court of equity must always aim to act upon broad principles of justice, disengaged as much as possible from little technicalities."

Ogden vs. Thornton, 30 N. J. Eq. 569–572.

We cannot help but think that the opinion of the Court, if it stands, operates as a proclamation to the effect that anyone may safely have himself appointed guardian of infant heir, borrow the money to buy their estate, and then use their funds to pay the notes given for the purchase price, provided only that he pays full value for the property. The inquiry as to value may carry the labors of the court back for a period of twenty years or more,—when most of those who knew best at the time of the sale of the value are dead and gone. The wards on arriving at their majority labor under an obvious disadvantage in an effort to get proof that would convict the guardian of actual wrongdoing, of any conscious purpose to do evil, of any attempt to overreach or defraud them. [48]

It seems not only an abhorrent invitation to guardians to use the trust funds in their hands in business ventures of their own, not to say speculation, but an invitation to anyone who has no scruples against so using funds to procure himself to be appointed guardian that he may thus utilize the funds of his wards.

Certainly the Court ought, if it approves a doctrine fraught with such imminent danger to the helpless, at least to add a deterrent qualification under which the guardian would find it no less expensive than if he had obtained the money elsewhere.

Coupled with sanction of a procedure by which the guardian charged himself with interest at three per cent annually, the lamentable evil of the Court's holding, it is impossible adequately to estimate.

[Excerpt from Respondent's Brief in Reply to Petition for Rehearing, in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

Also that part of respondent's brief in reply to the Petition for Rehearing which dealt with the matter of interest, as follows:

The third ground urged in the Petition for Rehearing is utterly without merit. The question involved is not before the court on this appeal. The matter was disposed of by this Court in the following language:

> "It may be that upon the settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time than was actually required of him, *but that question is not before us.*"

And how, we ask, could it possibly be before the Court in this proceeding? The foundation of plaintiff's action was and is the claim that the sale of the stock in question was fraudulent and void, and the purpose of the action was to disaffirm the sale. Utterly routed in their attempt to overturn the sale in question, counsel now ask the Court at this time to treat [49] their cause of action, disaffirming the sale, as one *affirming* the sale and to now grant appellant relief upon that theory.

Counsel, who would "blow hot and cold" in the same breath, declare, on page 126 of their brief, that appellant "does not claim such accounting specifically in his bill of complaint, because relief of that character proceeds upon the basis of *an affirmance of the sale.* He *could not make such specific claim and maintain his action.*" *But* his counsel do not hesitate to make it for him, which is the same thing, and without right, as we shall presently show.

The principle involved is thus stated:

> "A party cannot, either in the course of litigation, or in dealings *in pais* occupy inconsistent positions, and where one has an election between several inconsistent causes of action he will be confined to that which he first adopts. Any decisive act of the party, done with knowledge of his rights and of the facts, determines his election and works an estoppel."
>
> Bigelow on Estoppel (3d Ed.), pp. 562, 600, 603.

In Robb vs. Vas, 155 U. S. 43, the Supreme Court says:

"In Conniham vs. Thompson, 111 Mass. 270, at page 272, the court said: 'The defense of waiver by election arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract or sale of property. In such cases, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, *determines the legal rights of the parties, once for all.* The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon.' "

In Conrow vs. Little, 115 N. Y. 387, 394, the Court said:

"The contract between Branscom and the plaintiffs was, upon the discovery of Branscom's fraud voidable at their election. As to him, the plaintiffs could affirm or rescind it. They could not do both, and there must be a time when their election should be considered final. With them that time was when they commenced an action for the sum due under the contract, and in the course of its persecution applied for and obtained an attachment against the property of Branscom as their debtor."

See Newell vs. Meyendorff, 9 Mont. 254;

Thompson vs. Howard, 31 Mich. 309. [50]

Again, in any view of the case, if interest in any amount was due from John M. Smith, as guardian,

to the appellant, the claim for that interest was one which after his death must have been presented to the estate of John M. Smith before suit could be maintained thereon. (Respondent's Brief, pages 84–96.) And yet, counsel for appellant, in their petition for a rehearing, ask this court to disregard the statutes of the State, to reform their complaint and change the nature of their cause of action, to the end that, on rehearing, appellant may be granted relief to which, they admit, in their brief, he is not entitled.

Among the sections of the statute which would be utterly disregarded if such a course of action were pursued are Sections 7525, 7526, —— 7530, 7532 and 7534, of the Revised Codes.

Also certified copy of Abstract from Probate Register, for the year 1900, of the District Court of Meagher County, State of Montana, to wit:

[Plaintiff's Exhibit No. 1—Abstract from Probate Register, in Re Estate of William Smith et al., in District Court of Meagher County, Montana.

No. 255.

In the Matter of the Estate and Guardianship of WM. SMITH et al.,

Minors.

Date.	Memorandum of Papers.
Feb. 24, 1899.	Petition for Appointment of Guardian.
" " "	Order Directing Notice of Application for Guardianship to be Given to Relatives of Minors.

Feb. 24, 1899.	Affidavit of Posting Notice of Application for Letters of Guardianship.
Feb. 24, 1899.	Affidavit of Mailing Notices.
May 25, "	Bond of Guardian and Oath.
" 28 "	Order Appointing Guardian.
June 15, "	Order for Allowance for Care, Maintenance and Education of Wards.
Mch. 30, 1900.	Order Appointing Appraisers.
June 13, "	Inventory.
" 13, "	Annual Account of Guardian.
" 14 "	Decree of Settlement of Acct.
Dec. 11, "	Order Allowing Guardian to Use Money of Estate. [51]
Dec. 1, 1906.	Receipt of Anna Maud Smith.
" 1, "	Receipt of Nellie May Smith.
Dec. 1, "	Final Account.
" 1, "	Pet. for Final Settlement, etc.
" 1, "	Order App't Day of Settlement.
" 1, "	Aff. of Posting Notice.
" 14, "	Decree of Settlement Final Acct., etc.
" " "	Decree of Final Discharge.
" " "	" " " "
" " "	" " " "

Duly certified by the Clerk under the Seal of the Court.

Counsel for plaintiff introduced in evidence the following stipulation in this cause between the counsel for the respective parties, filed January 16, 1914:

Stipulation [Re Absences of John M. Smith and Mrs. Mary M. Smith from State of Montana, etc.].

IT IS HEREBY STIPULATED and AGREED by and between the parties hereto that the following statements regarding the absences of the late John M. Smith from the State of Montana or his presence in the State, as the case may be, and the absences of Mrs. Mary M. Smith, the above-named defendant, from the State of Montana and her presence therein, as the case may be, shall be taken as proof of these facts for all purposes in this case, and that no other evidence need be introduced regarding these matters.

IT IS STIPULATED and AGREED, That the late John M. Smith was absent from Montana during the whole of the month of December, 1906, and during eight months of the year 1907, and during the remaining four months of that year he was present in the State of Montana; that during the year 1908 he was present in the State of Montana two months and absent therefrom the rest of the time previous to his death;

That the defendant, Mrs. Mary M. Smith, was absent from [52] the State of Montana during the months of November and December, 1908; that during the year 1909 she was absent from the State of Montana during the months of January, February, March, April and October, November and December, to wit, seven months out of the twelve; that in the year 1910 she was absent from the State seven months out of the twelve; that in the year 1911 she was absent from the State of Montana seven months out of the twelve; that in the year 1912 she was ab-

sent the whole of the year; that she was absent from the State of Montana during the first five months of the year 1913, and part of the month of June, to wit, that she returned to the State in the month of June, 1913.

Signed in duplicate this 6 day of January, 1914.

[Excerpt from Testimony of John M. Smith from Reply Brief in Smith vs. Smith in District Court of Meagher County, Montana.]

In their reply brief in this cause, counsel for plaintiff referred to the testimony of John M. Smith on cross-examination, beginning on line 6, page 539, to line 20, page 540, of the record on appeal, in said court, in said case of Smith vs. Smith, as follows:

Witness spoke to Judge Armstrong about the matter of the use of the moneys by him; that as near as he can remember he asked Judge Armstrong for the privilege of borrowing the money. He didn't tell him that he had already used it, but wanted the privilege of using it at three per cent; when he had given security for it; had given his note, so that it was perfectly safe. That he referred to the Security Company when he said he had given security, and he meant that he gave them security by this security company for the amount of $8,500, for saving and keeping the money for the heirs of William A. Smith. As near as witness could remember, the judge, in the conversation referred to above, said it was a large amount of money and that he, the judge, thought that the proposal was all right; [53] that it being safe and secure a large amount of money like that which was hard to place where it would all

be safe would be better loaned in bulk that way.

Counsel for plaintiff introduced in evidence the judgment-roll and the decision of the Circuit Court of Appeals for the 9th Circuit, in Cause No. 1830, Nellie Mae Moore, Appellant, vs. John M. Smith et al., Appellees; and as the same are of the records of said Court of Appeals, they are not set out herein, but may be referred to and considered as if set out in full herein.

[Testimony of William J. Smith, for Plaintiff.]

On the trial of this cause, plaintiff, WILLIAM J. SMITH, being called and sworn as a witness in his own behalf, testified in substance as follows:

That he is the complainant in this case; that he lives in Los Angeles, California; that he has lived there about a year; that he was living there in May, 1913; that he has lived in California since January, 1913; that he left Montana the latter part of January; that when he left he intended to make his home in California. That when he attained his majority he was in Missoula, Montana, going to school; that he had never up to that time, been engaged in business; that he had had no business experience; that he had never taken any course in commercial affairs, or any business college; that during his boyhood he had gone to school all his life; that the money paid to him by his uncle, John M. Smith, coming to him from the estate of his father, he received shortly after he became of age, in the year 1906; he received the money on the ranch of the Smith Bros. Sheep Company, in Meagher County, Montana; that his uncle was not there; that he dealt with N. B. Smith and

(Testimony of William J. Smith.)

Wallie Flatt; that N. B. Smith wrote him to come to White Sulphur Springs; that the witness went there and N. B. Smith [54] there told him the estate was already for final settlement, and wanted to know if the witness would look over the papers with him, which he did. That about all the witness could figure out was the expense account, what he had spend; that N. B. Smith explained to him that he was to get the same amount of interest that was allowed on Government bonds; that this is about all there was to it. That the witness looked over the expense accounts, checks that he had drawn, money that he had drawn; that N. B. Smith gave him stock in the Alice and Blackhawk mines, among others, and explained to the witness that he was not able to divide the lots in White Sulphur Springs, as it was an undivided third. Witness took it for granted that the account was all right, and let it go; that he was not in court; that he did not have any proceeding in court; that he did not consult a lawyer or have a lawyer with him; that N. B. Smith told the witness that he could get Black to go over this thing with him. But he said he didn't see it would be any use. The witness did not get Black. N. B. Smith told the witness he would have to see Wallie Flatt to get the check; witness went to Martinsdale, and Flatt gave him the check. A telephone call from his sister, Nellie Mae Moore, first caused the witness to suspect the correctness of the amount, and of the dealings of his uncle in the matter of the estate; that it was after that the witness found out that this occurred. Wit-

(Testimony of William J. Smith.)

ness thinks this occurred some time in the early part of August, of the year 1907, he thinks; 1906 or 7; the witness is not positive which; that it was after he got his money; that it must have been after 1906; that it was in 1907.

Cross-examination.

Witness does not remember how early in August it was that he got word from his sister by telephone. He thinks it was [55] some time in August; that it is quite a while ago and the witness cannot remember exactly; witness cannot say how early it was in August; he would judge it was before the 15th of August. Witness remembers testifying in the case of Smith vs. Smith, in the District Court of Meagher County.

Q. I will ask you whether or not in that case you did not testify that you learned of what is alleged to be the fraud in the transaction some time in the Spring of 1907?

A. Well, I would consider that in the Spring.

Q. You would consider August in the Spring?

A. Yes. I didn't know that I said that, I don't remember.

The attention of the witness was directed to his testimony, given in the said case of Smith vs. Smith, wherein he testified that he has learned about the conditions of the sale from his sister, Nellie Mae Moore, who telephoned him from Helena to Missoula, where the witness then was, to come over to Helena; that the witness thought it was the same year that he received the money; that he thought it was in the year

(Testimony of William J. Smith.)

1907; that he didn't remember whether it was in the Fall or in the Spring; that it was in the Spring he thought, because it was good weather. And to his testimony on cross-examination in answer to the question, as to the year and the time of the year when he received this information, to which he answered that he was of the opinion that it was in the Spring; that it must have been in 1907, the witness was then asked if he testified that way. That the witness answered yes, and that he was saying the same thing yet; that prior to this telephone call he does not remember of having had any communication from his sister in reference to the matter; that he does not think that he had heard from Mr. T. J. Hoolan in reference to it; that he doesn't remember; that he cannot state positively whether he did or did not; that Hoolan was in Montana in the Spring of 1907, with [56] the witness believes, Mr. Moore, the husband of his sister. Witness did not meet them until they were here quite a while; does not believe he met them before he met his sister; cannot remember whether they had written him or not; that the witness was present at the time the testimony was taken before the examiner in the case of Nellie Mae Moore vs. John M. Smith; that in California the witness works as an automobile salesman and drives a machine; that he first went to California in January, 1913; that he worked for about two months for the Merchants' Mercantile Company; that he next went East on a business trip; that he was then located in Los Angeles. That prior

(Testimony of J. R. Wine.)

to going to California he had been in Montana about seven years; that in 1907 he was living in Missoula, and in 1908 in Helena; in 1909 and 1910 in Helena.

[Testimony of J. R. Wine, Jr., for Plaintiff.]

J. R. WINE, Jr., called and sworn as a witness on behalf of complainant, testified in substance, as follows:

That he was an attorney at law, employed in the office of Nolan & Scallon, attorneys for complainant; that as soon as this case was set down for hearing he procured the issuance of a subpoena for N. B. Smith, of White Sulphur Springs, and placed it in the hands of the United States Marshal, for service. That thereafter we decided to serve it by telegraph, so that Mr. Smith would have time to get here for the hearing, and for that purpose the witness and the Deputy United States Marshal communicated with the Sheriff of Meagher County by telephone. The Sheriff informed us that N. B. Smith was in Washington, and as far as he could learn would not return for some time. A copy of the subpoena had been prepared to be telegraphed to White Sulphur Springs, but after it was learned from the sheriff that Mr. Smith was not there, the subpoena was not telegraphed over. That the sheriff at the same time [57] agreed to send over an affidavit setting up these facts, which affidavit had not arrived at the time of the hearing. Witness advised the deputy marshal that he would pay the fees. The witness advanced the marshal the money for the same.

DEFENSE.

That on the trial of this cause, counsel for defendant offered in evidence the judgment-roll, contained in the printed Record on Appeal, to the Supreme Court of the State of Montana, in the case of William J. Smith, plaintiff and appellant, vs. Mary M. Smith, as executrix, et al., defendants and respondents, which judgment-roll is as follows:

[Judgment-roll in Smith vs. Smith, etc., in District Court of Meagher County, Montana.]

(Title of Court and Cause.)

Amended and Supplemental Complaint [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

Comes now the above-named plaintiff, and leave of Court being first obtained, files herein his amended and supplemental complaint, and for cause of action against the above-named defendants complains and alleges:

1. That the defendant Smith Bros. Sheep Company is a corporation organized and existing under the laws of the State of Montana, and having its principal place of business in the County of Meagher, in the State of Montana; that plaintiff is a son of the late William A. Smith; that the latter died on February 13, 1897, at White Sulphur Springs, in the State of Montana, and that at the time of his death the said William A. Smith was a resident of the State of Montana.

2. That the said William A. Smith left as his only heirs, his three minor children, of which the

plaintiff is one, and that the other children are Annie Maud, now the wife of L. D. Kahle, of Metamora, in the State of Ohio, and Nellie Mae, now the wife of William H. Moore, of St. Louis, Missouri; that at [58] the time of the death of his father, the plaintiff herein was of the age of eleven years, that his sister, Annie Maud, was of the age of ten years, and his sister, Nellie Mae, was of the age of nine years.

3. That the said William A. Smith left a will by which he devised and bequeathed all of his property to his said children share and share alike; that on or about the 5th day of April, 1897, the said will was admitted to probate in the District Court of what was then the Ninth Judicial District of the State of Montana, in and for the County of Meagher, and the defendant Napoleon B. Smith was appointed executor in pursuance of the provisions of said will; that on April 6, 1897, the said defendant Napoleon B. Smith qualified as such executor, and letters testamentary were then and there issued to him in said estate, as plaintiff alleges on his information and belief.

4. That on May 15, 1897, as plaintiff alleges on his information and belief, an inventory and appraisement of said estate was returned to the court by said executor; that amongst other property left by said deceased and forming a part of said estate and listed in said inventory were 122,950 shares of the Smith Bros. Sheep Company aforesaid.

5. That on January 12, 1898, as plaintiff alleges on his information and belief, the said executor filed in the said District Court his petition praying that he be allowed to sell the aforesaid shares of stock

in said company at private sale at a sum not less than $75,000, and that the only reasons given by the said executor in his said petition for the sale of said property are set forth in said petition in the words and figures following, to wit:

"That the greater portion of the property of said estate consists of 122,950 shares of stock in the Smith Bros. Sheep Company, a corporation organized under the laws of the State of [59] Montana, for the purpose of growing, buying and selling of sheep, wool, horses and cattle, and the acquiring of lands and water rights for the purpose of carrying on said business; that the whole stock of said company consists of 250,000 shares, of which John M. Smith and Mary A. Smith, his wife, own more than one-half; that the said John M. Smith is 64 years of age and is in poor health, and that his wife is also in poor health, and both are desirous of selling their entire interest in said Smith Bros. Sheep Company, and stock thereof; that said Smith Bros. Sheep Company, corporation aforesaid, will expire by limitation in the year A. D. 1900; that the property of said company consists of lands, sheep, horses and cattle; that said John M. Smith is a brother of said deceased, and had been associated with him in business for the period of thirty years prior to February, 1897; that should the said John M. Smith and Mary Smith sell their interest in said stock, then the stock of the said estate would be greatly depreciated in value, and the same would be at the mercy of the majority stockholders; that by selling said stock at private sale, and in conjunction with the sale of the stock

by the said John M. Smith and Mary Smith, the same could be sold at a much greater price than in any other manner, and that the sheep business is in such condition that the same could be sold now at a good price and for an amount exceeding the appraised value thereof, to wit: $61,475; that your petitioner is informed and believes that he can bond or sell the stock of said estate for a sum not less than seventy-five thousand dollars, in case the said John M. Smith and Mary Smith sell their stock at the same rate; that your petitioner believes this a rare opportunity to sell said stock at so large a price, and that it is for the best interest of said estate that said stock be sold at this time." [60]

That said petition was heard by the Judge of said court at chambers at Bozeman on January 24, 1898, and as plaintiff alleges on his information and belief, that the said executor then and there presented to said Judge in support of said petition and affidavit made by the defendant John M. Smith, which affidavit is in words and figures as follows, to wit:

"*In the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Meagher.*

In the Matter of the Estate of WILLIAM ALONZO SMITH, Deceased.

State of Montana,
County of Meagher,—ss.

John M. Smith, being first duly sworn, deposes and says: That he was a brother of the deceased; that the stock of the Smith Bros. Sheep Company is

owned by affiant and his wife Mary A. Smith and the estate of said deceased; that affiant and his said wife own more than one-half of the stock of said company; that affiant and his said wife are both in poor health, and that his said wife is now away from the State of Montana for the purpose of benefiting her health by means of change of climate; that affiant is affected with asthma and catarrh and has been advised by physicians that he will have to seek a change of climate if he desires to be relieved from his ailments aforesaid; that it is the intention of affiant and his said wife to dispose of their stock and interest in said company as soon as they can dispose of the same for a fair cash value; that said company is a corporation organized under the laws of the State of Montana for purpose of engaging in sheep, cattle and horse business and the acquisition of lands and water rights to be used in said business; that the company is the owner of large tracts of land and some 35,000 head of sheep and other personal property used in said business; that the property of said company could be sold at this time as [61] affiant is informed and believes at a better price than at any other time, and that said stock of the estate could be sold at a greater price by being disposed of in connection with sale of the stock of affiant and his wife; that said corporation will expire by limitation in the year A. D. 1900; that it would be for the best interest of said estate that its stock be sold at private sale.

JOHN M. SMITH.

Subscribed and sworn to before me this 20th day of Jany., 1898.

N. B. SMITH,
Notary Public."

That no guardian of any kind was appointed to said children at or prior to said hearing and that no one appeared thereat on their behalf.

That the said affidavit was sworn to before the said Napoleon B. Smith as notary public; that said affidavit was made for the purpose of obtaining from the said Judge an order for the sale of said property; that on January 24, 1898, an order was made by the Judge of said court in pursuance of said petition and largely because of said affidavit made by the said John M. Smith, allowing the said executor to sell said shares of stock at private sale without notice.

That the said executor did not proceed to sell the said property until the following year, to wit; until on or about the 16th day of February, 1899; that on or about the said last-mentioned date the said Napoleon B. Smith, according to his return and account of sale on file in said matter sold or pretended to sell to the defendant John M. Smith the said shares for the sum of $85,000, of which $10,000 was to be paid down, and the remaining $75,000 were to be paid when the Court approved the sale; that in said report, the said Napoleon B. [62] Smith recited that he had sold the said shares of stock at private sale without notice to said John M. Smith for the aforesaid sum, and that the said sum of $10,000 had been paid on account; that on March 28, 1899, the said Court

made an order confirming the said sale to the said John M. Smith; that the aforesaid balance of $75,000 was not paid to the said executor until April 27, 1899, if paid at all; that the said pretended payments of $10,000 and $75,000, respectively, were not made with money, but in the manner as follows, to wit: That the said John M. Smith obtained credits at a bank in Helena, Montana, known as the Union Bank & Trust Company, for the said sums, by giving his personal notes therefor, and that he sent his checks for similar sums to the said N. B. Smith. That said John M. Smith was then in California and sent his checks from there, the first for $10,000 in February, 1899, and the second for $75,000 in April, 1899. That on or about the 10th day of February, 1899, said N. B. Smith obtained in exchange for the said check of $10,000 a certificate of deposit from the said bank, for a similar sum. That on or about April 27th, 1899, said N. B. Smith turned in to this said bank, the said certificate of deposit, and the said check of John M. Smith for $75,000, and in exchange therefor, obtained a certificate of deposit for $80,000 to his credit as executor and an open account credit for $5,000 to his personal order.

That on June 14th, 1899, the said N. B. Smith, having previously obtained his discharge as administrator endorsed and turned over to the said John M. Smith, who had meanwhile been appointed guardian of the plaintiff as aforesaid and of his sisters, the said certificate of deposit and gave him his (N. B. Smith's) check on said bank for $2,174.20.

That within three (3) days thereafter, the said John M. Smith endorsed and turned in to the said bank, the said certificate [63] of deposit of $80,000 and the said check of N. B. Smith, for $2,174.20 in part payment of the notes which said John Smith had given to the said bank as aforesaid, and then or later, paid the balance of the said notes and the interest thereon with moneys obtained from said Smith Bros. Sheep Company.

That prior to the consummation of said sale, to wit, on or about the 24th day of February, 1899, the said John M. Smith filed in said Court his petition in writing, praying for his own appointment as guardian of the person and property of plaintiff and the other children and heirs of the said William A. Smith; that said petition was duly heard by said Court on the 28th day of March, 1899; that said Court then and there duly appointed the said John M. Smith guardian of the persons and property of the plaintiff and his two sisters; that the said defendant John M. Smith thereafter duly qualified as such guardian and acted as such until the respective majorities of the said children.

That on June 14, 1899, a decree of settlement and distribution of the said estate was made and entered by the said Court; that by said decree, the property of said estate was distributed to this plaintiff and his said two sisters in the proportion of one-third to each; that on the said day the said executor received his final discharge, and that on the said day the said defendant John M. Smith gave his receipt as guardian of the said children to the said Napoleon B. Smith

for such property as said executor then had in his hands belonging to said estate, and that thereby the said John M. Smith gained possession of all of the property of the said plaintiff and his two sisters.

6. That in August, 1899, the term of the existence of said corporation was extended for ten years from April 19, 1900, as plaintiff alleges on information and belief. **[64]**

7. The plaintiff further alleges and charges on information and belief that the alleged sale of said 122,950 shares of the capital stock of the said Smith Bros. Sheep Company was illegal and fraudulent and that it was collusive; that the said John M. Smith was without the right to purchase said property; that his duty as guardian, *quasi* guardian or applicant for guardianship, was incompatible with the purchase by him of said property; that prior to his actual appointment John M. Smith stood in the position of a *quasi* guardian; that more than one year had elapsed from the date of the making of the order of sale thereof; that no re-appraisement of this property was had; that said John M. Smith had by his affidavit and otherwise procured or aided in procuring the making of the order of sale; that he was the president of the said company had been for many years a partner of William A. Smith in business, and stood at that time in the place of a parent to said children; that meanwhile, as plaintiff alleges on information and belief, the said John M. Smith had decided to retain his stock in the said company and to continue the business thereof, and did in fact do so; that the business and property of said company had greatly improved

during the said year, and that the business in which it was engaged was, at the time of the sale, increasing in prosperity and in value, and that the property of the said company was also steadily increasing in value; that the reasons given in the petition of the said executor and in the affidavit of the said John M. Smith for the sale of the said property had most of them ceased to exist, and that all had lost their force, if they ever had any.

That said John M. Smith procured his appointment of guardian of the plaintiff and his sisters, with the intention and for the purpose of getting back into his possession, any moneys, or whatever else he, the said John M. Smith, might have paid **[65]** or pretended to pay to the said executor for said stock, and with the intention and design of using the same to pay off and discharge the liabilities incurred or to be incurred by him, to the said bank as above alleged.

That the procurement of his appointment as such guardian, and the use of such certificate of deposit, and of the said check in payment of his said notes, were a part of a plan conceived prior to the purchase of said stock by the said John M. Smith, and that he relied upon the success of that plan in making the alleged purchase and in dealing with the said bank as aforesaid, and that the funds or credits which he expected to get back into his possession as guardian were relied upon by him as the means of enabling him to make such purchases.

That it was then and there to the interest of the said children and of the said estate of the said William A. Smith to retain the ownership of the said

shares of stock, notwithstanding all these considerations, the said Napoleon B. Smith and the said John M. Smith colluded and confederated as plaintiff alleges on information and belief, to secure the said property to the said John M. Smith, and to sell the same to him at much less than its real value, and that in pursuance of this collusion, the said Napoleon B. Smith proceeded to make the alleged sale to the said John M. Smith, and to obtain confirmation thereof, and delivered said shares to him, and the latter to enter into the alleged contract of purchase heretofore set out; that the value of the said shares of stock so sold to the said John M. Smith was very much in excess of the price paid therefor, and that the price was greatly disproportionate to the real value thereof; that the said Napoleon B. Smith had full knowledge of the petition of said John M. Smith for his own appointment as guardian and of the appointment of the said John M. Smith as guardian; that the said Napoleon B. [66] Smith is a nephew of the said John M. Smith and was at the time in question herein his attorney and connected with his business, and the said John M. Smith was one of the sureties on the bond of the said Napoleon B. Smith as the executor of the estate of William A, Smith; that by means of his appointment as guardian and within less than two months after the day mentioned in the accounts of Napoleon B. Smith as that of the receipt of the $75,000 from the said John M. Smith, as the balance of the purchase price, the said John M. Smith came into possession of all the moneys and property of the said estate and of the very moneys

which he was supposed to have paid to the estate of William A. Smith; that later, to wit, on or about the 11th day of December, 1900, the said John W. Smith procured from the said District Court an order authorizing him to borrow from the funds in his hands belonging to the said minors, to wit, the sum of $82,000 according to the statements in said order, at the rate of three per cent per annum. That the estate of the said John M. Smith is still the holder of the aforesaid shares of stock of the said corporation; that the same are now of great value; that the rate of interest charged by banks and other money lenders was at the times in question not less than eight per cent, and that the said John M. Smith had to pay that rate or more on moneys borrowed.

8. That the plaintiff did not become of age until the 10th day of October, 1906; that during most of the time that has elapsed since the date of his father's death and prior to the commencement of this suit plaintiff has resided out of or was absent from the State of Montana; that prior to the year 1905 he had made a couple of visits to Montana during the summer, but only one of these visits was in the county of Meagher aforesaid; that in the year 1905 plaintiff went to Missoula to attend the State University, and lived there till after the [67] commencement of this suit, that the plaintiff had no knowledge of the fraud practiced upon him as aforesaid until the discovery thereof by him, and that such discovery was made within the last thirty days preceding the commencement of this suit and that this suit was begun on the —— of ————, 1907.

9. That the plaintiff is ready and willing to restore to the said estate of John M. Smith everything of value which the said plaintiff has received from the said John M. Smith under or on account of the said stock, and hereby offers to restore the same to the said estate of John M. Smith and to do any other thing that may be necessary or proper to replace the said estate of John M. Smith in the position which John M. Smith was in at and prior to the time of the alleged purchase by him of the said stock, and everything else that equity may require.

10. That at Battle Creek, in the State of Michigan, on the 12th day of September, 1907, this plaintiff personally rescinded the said transaction, and sale, of the said stock, and then and there offered to restore to the said John M. Smith the plaintiff's share, to wit, $28,333.34, with interest and demanded of the said John M. Smith that the latter transfer to the said plaintiff one-third of the said shares, to wit, 40,983⅓ shares, of the capital stock of the said company, but that the said John M. Smith then and there positively refused to do so, and in any manner to comply with said demand.

11. That at the time of his death the said John M. Smith, as plaintiff alleges on his information and belief, owned most of the shares of the capital stock of the said Smith Bros. Sheep Company; that he was the president thereof and controlled the said company, and that nothing could be done by it without his sanction; that the said company has made and accumulated [68] very large profits and that the said John M. Smith has received on account of said

shares very large profits, the exact amount of which is unknown to plaintiff, and cannot be ascertained by him except by means of an accounting and that the aforesaid shares of stock have been transferred on the books of said company to the said John M. Smith, and now stand in his name.

12. That the plaintiff has no adequate remedy at law in the premises.

And the plaintiff further alleges on his information and belief:

13. That on or about the 6th day of October, 1908, the said John M. Smith departed this life, leaving a last will and testament, and that in said last will and testament the defendant Mary M. Smith was named as executrix; that thereafter, to wit, on the 17th day of November, 1908, the said Mary M. Smith was duly appointed the Executrix of said last will and testament of said deceased. That thereafter, and before her substitution in this case, she duly qualified as such executrix, and ever since has been and now is the duly appointed, qualified and acting executrix of said last will and testament.

That on or about the 18th day of December, 1908, in pursuance of an order duly made by this court, the said Mary M. Smith, as such executrix, caused to be published in a newspaper published in the said county of Meagher a notice to the creditors of the said John M. Smith, deceased, requiring them to exhibit their claims within ten months, as provided by law, and that thereafter, to wit, on the —— day of April, 1909, and within ten months from the publication of said notice, the above-named plaintiff duly

presented and exhibited his claim in writing for and on account of the matters set forth in this complaint, as required by said notice, to wit, at the office of Napoleon B. Smith, in the town of White Sulphur Springs in the [69] said County of Meagher; that said office was designated in said notice as the office of said executrix as the place where such claim should be presented. That the said executrix was not then present, and that said claim was then duly left at said office for her, with, and in the care of, the said Napoleon B. Smith. That the said claim was supported by an affidavit of said plaintiff and claimant, and the said claim and the amount thereof was justly due, that no payments have been made thereon, and that there were no offsets to the same to the knowledge of said affiant; and that full particulars of the said claim, as set forth in his complaint, were given and set forth in the said claim and statement thereof. That the said Mary M. Smith, as plaintiff alleges on this information and belief, was then absent from the county of Meagher. That said claim was neither allowed nor rejected within ten days from and after the presentation thereof, and after the expiration of said ten days, to wit, on or about the 2d day of June, 1909, an order was duly made and entered in this court and in this case substituting the said Mary M. Smith as such executrix in this case in place of the said John M. Smith, deceased. That she has appeared herein, and is now a defendant in this case.

Wherefore, plaintiff prays judgment and decree of this Court that the plaintiff is, and was at all times

in question herein, the beneficial owner of 40,983⅓ shares of the capital stock of the Smith Bros. Sheep Company, to wit, one third of the shares pretended to be purchased by the said John M. Smith as aforesaid, and all the profits, dividends and increments thereof and which have accrued thereon; that the said Mary M. Smith as the executrix of the will of said John M. Smith be called fully to account to the plaintiff for all such profits, dividends and increments, and to transfer and deliver to the plaintiff 40,983⅓ shares of stock of the said corporation [70] free from all claims, liens or encumbrances, upon this plaintiff restoring to said defendant everything of value which she has received from the latter on account of said transactions that said corporation be called on to render an account and statement to the plaintiff together with the said Mary M. Smith for the operations of said company, and prohibited from allowing the transfer to any other person by the said Mary M. Smith of any larger number of shares of the capital stock of said company than that which would remain in her name or under her control after deducting 40,983⅓ shares therefrom; and that if the said Mary M. Smith shall fail to deliver said shares of stock to the plaintiff that such a transfer be made by a commissioner of this court, and that an equivalent number of shares standing in her name or the name of John M. Smith be cancelled on the books of the company, and that the said corporation be ordered to make such cancellation and such transfer to the plaintiff; and that the said Mary M. Smith be enjoined pending this suit from

assigning, transferring or otherwise disposing of any larger number of shares of the stock of said company than will allow to remain in her name or under her control above the number of shares claimed by plaintiff, to wit, 40,983⅓; and for such other and further relief as may be just and equitable.

WILLIAM SCALLON, and
T. J. HOOLAN,
Attorneys for Plaintiff.

(Title of Court and Case.)

Answer [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

Come now the defendants above named and for answer to the amended and supplemental complaint, heretofore filed in said cause. [71]

1. Admit all the allegations contained in paragraphs 1, 2, 3 and 4 of said complaint, except that the inventory and appraisement referred to in paragraph 4 of said complaint was returned to said court on May 5, 1897, and not on May 15, as alleged in said paragraph.

2. Defendants admit all of paragraph 5 of said amended complaint down to and including the words "notary public" in line 20, page 6 of said amended complaint; defendants admit that said affidavit of John M. Smith, referred to in said paragraph 5, was made for the purpose of being used to support an application to obtain an order to sell said stock; defendants admit that on January 24, 1898, an order was made by the Judge of said court allowing the said executor to sell said shares of stock at private sale,

without notice, but defendants deny that said order was made largely because of said affidavit made by the said John M. Smith; defendants deny that said executor did not proceed to sell the said property until on or about the 16th day of February, 1899, but defendants allege the truth to be that said sale was made by said executor to said John M. Smith prior to the 16th day of January, 1899; defendants allege that said sale of said stock was made by said executor to said John M. Smith for the sum of $85,000.00, of which sum $10,000 was paid to said executor by said John M. Smith on or about the 8th day of February, 1899, and that the balance of said sum, to wit: the sum of $75,000.00 was paid by said John M. Smith to said executor on the 27th day of April, 1899; admit that in said report of said sale said executor recited that he had sold the said shares of stock at private sale to said John M. Smith for said sum of $85,000.00, and that of said sum $10,000 had been paid on account, defendants admit that on March 28, 1899 said Court made an order confirming the said sale to said [72] John M. Smith; defendants deny that said sale was a pretended sale; but on the contrary allege that said sale was made in good faith by the parties thereto and that the price paid by said John M. Smith for said stock was a price in excess of the then value of said stock.

3. Defendants admit that on June 14, 1899, said executor, Napoleon B. Smith, having on that day obtained his discharge as executor of the estate of William A. Smith, did on said day turn over to said John M. Smith, who had theretofore been appointed

guardian of the plaintiff and of the other children of William A. Smith, all the money and property of the said estate of said William A. Smith which he then held in his hands, and that at the same time said N. B. Smith took from said John M. Smith, his receipt as guardian for said property and the whole thereof; defendants admit that said John M. Smith on June 17, 1899, applied all the moneys received from said executor, as far as they went, toward the payment of his said notes for $10,000.00 and for $75,000.-00 in said Union Bank & Trust Company and that he gave a new note for the balance and interest.

4. Defendants admit that on or about the 24th day of February, 1899, said John M. Smith filed in said court his petition in writing praying for his own appointment as guardian of the persons and property of said plaintiff and the other children of said William A. Smith; that said petition was duly heard by said Court on the 28th day of March, 1899; that said Court then and there duly appointed the said John M. Smith guardian of the persons and property of the plaintiff and his two sisters; that said John M. Smith thereafter duly qualified as such guardian and acted as such until the respective majorities of the said children; that on June 14, 1899, a decree of settlement and distribution of the said estate was made and [73] entered by the said Court; that by said decree the property of said estate was distributed to this plaintiff and his said two sisters in the proportion of one-third to each; that on said day the said executor received his final discharge; that on said day the said defendant, John

M. Smith, gave his receipt as guardian of the said children to the said Napoleon B. Smith for such property as said executor then had in his hands belonging to the estate; defendants deny that said petition for the appointment of guardian was filed prior to the consummation of said sale; defendants deny that said property of said estate came into the hands of said John M. Smith otherwise than as guardian, or that he obtained or held said property otherwise than as guardian of said children.

5. Defendants deny each and every allegation in paragraph 7 of said complaint down to and including the word "thereof" in line 14 of page 12 of said complaint; defendants admit that said Napoleon B. Smith had full knowledge of the petition of John M. Smith for his appointment as guardian and of the appointment of said John M. Smith as guardian; that said Napoleon E. Smith was a nephew of said John M. Smith; that said John M. Smith was one of the sureties on the bond of said Napoleon B. Smith as the executor of the estate of William A. Smith; defendants admit that on or about the 11th day of December, 1900, said John M. Smith obtained from said District Court an order authorizing him to borrow from the funds in his hands, belonging to the said minors, the sum of $82,000.00 at the rate of three per cent per annum; that the estate of John M. Smith is still the holder of the shares of stock of said corporation so purchased from said executor, N. B. Smith, and that the same are of value.

6. On information and belief defendants deny

each and [74] every allegation contained in paragraph 8 of said amended complaint.

7. Defendants admit the allegations contained in paragraph 10 of said amended complaint.

8. Defendants admit that at the time of his death John M. Smith owned most of the shares of the capital stock of said Smith Bros. Sheep Company; that he was the president thereof and that the aforesaid shares of stock have been transferred on the books of said company to said John M. Smith and that they stood in his name at the time of his death and now stand in his name.

9. Defendants admit the allegations contained in paragraph 13 of said amended complaint down to the word "law" in line 16 thereof.

10. Defendants deny each and every allegation in said amended complaint contained not herein expressly admitted or denied.

WHEREFORE, defendants, having fully answered said amended complaint, pray that plaintiff take nothing by his said complaint and that defendants have judgment for their costs herein expended.

WORD & WORD,
Attorneys for Defendants.

(Duly verified.)

Filed June 7, 1911.

(Title of Court and Case.)

Finding of the Court.

This cause came on for trial on the 26th day of June, 1911, on the pleadings herein and the stipulation of the parties hereto, said cause was tried by

the court sitting without a jury. T. J. Walsh, Esq., and T. J. Hoolan, Esq., appeared for the plaintiff, and R. Lee Word, Esq., appeared for the defendants. [75] After hearing the testimony and argument of counsel, the Judge, who tried said cause having fully considered said cause and the testimony therein, makes the following findings of fact and conclusions of law:

Findings of Fact [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

1.

In 1878 John M. Smith, then 44 years old, and W. A. Smith, then 34 years old, started in the sheep business in Meagher County, Montana, on a portion of the land which now belongs to the Smith Bros. Sheep Company.

2.

For years and until 1888 they were their own foremen and did most of the work. Until J. M. Smith married they kept no books, had no settlements and owned a common bank account on which both drew as they needed funds.

3.

W. A. Smith married in 1884, had three children, one boy and two girls, all born on the ranch where the family lived until 1890, when they moved to Castle (Smith's Camp), from which place, during W. A. Smith's absence in 1891, the mother went away taking her two little girls with her and leaving the boy in the care of a neighbor.

4.

John M. Smith married in 1887 and lived on the

ranch until the year after W. A. Smith's death, when in November, 1898, he went to California for the winter and every year thereafter, up to the time of his death, in October, 1908, spent over half of each year in California. He was a constant sufferer from asthma from 1895.

5.

In the fall of 1891 Wm. A. Smith took his boy to his sister, Mrs. Reynolds, then and now living in Fayette, Ohio, [76] and gave him into her keeping to bring up as a member of her family. In 1893, having gotten possession of his two girls, he placed them also with Mrs. Reynolds for the same purpose and all three of the children grew up in her family and were with her in Ohio at the time of their father's death. From the time they were placed with Mrs. Reynolds she was as a parent to these children.

6.

The Smith Bros. Sheep Company was formed in 1890 to take over the property and conduct the business of the two brothers. It was capitalized at 250,000 shares of $1.00 each. Of the capital stock 5,000 shares were issued to the wives of the brothers for joining in the deeds; 100 shares were issued to J. A. McNaught, a brother in law, who was their bookkeeper from 1888 until 1901, and the balance of the stock was divided equally between the Smith Bros., 119,950 shares to each. John M. Smith's wife retained her stock. Wm. A. Smith's wife disposed of all of hers; William A. Smith finally getting 3,000 shares of it and John M. Smith 2,000 shares. During Wm. A. Smith's life he was vice-

president of the company, being succeeded after his death by N. B. Smith, who then had 50 shares of stock. John M. Smith was president of the company from the time it was formed until his death.

7.

John M. and W. A. Smith managed the outside business, but neither of them knew anything about the books. These were kept by McNaught until he left the employ of the company, January 7, 1901. From that date on W. W. Flatt kept the books. At the time of this change John W. Smith was in California. Flatt was not a bookeeper and his entries were a mere memoranda. [77]

8.

From 1896 forward the company had about 150 range cattle, 10 milk cows, 30 head of work horses, 15 head of range horses, and 8 to 10 hogs. Aside from this its property consisted of sheep, of which it ran about 35,000 each year, and the ranch and improvements. By actual count there were 38,677 head of sheep on the ranch in March, 1899, which was excessive; the separate shearing account in July of the same year gave 38,339 head.

9.

The ranch consisted of titled lands and improvements and contract interests in railroad lands. Of the former or titled lands there were 14,818.8 acres of which all but 1920.42 acres (which lay in Park County) were in Meagher County, as was all of the personal property. The titled lands in Meagher County classified about 475 acres of first class farming and meadow lands; 298 acres of second class

farming and meadow lands; 6,827.14 acres of first class grazing lands (being lands that had some water on them), and 5,133.79 acres of second class grazing lands. The 1920 acres in Park were first class grazing lands. There were ditches with a capacity of covering 811 acres, but not over 300 acres had ever been plowed and not over 120 acres of said land had ever been in crops.

10.

The railroad lands were held on long time deferred payment contracts of sale at from $1.25 to $1.50 per acre all over the country, and the general custom in the buying and selling of such property and plants was to separately value the titled lands and then add the actual amounts paid down on the railroad contracts to cover the value of the contract interests.

11.

The improvements consisting of ditches, fencing, building and sheds, were of the kind usually found on a sheep ranch [78] and in selling or buying were usually included in the entire value as fixed by the price per acre, which also generally included farming machinery and work horses.

12.

The uncontradicted opinion of some of the best business men in Meagher County, men who had had a wide experience in the sheep business and who had known the Smith Bros.' ranch for many years, was that the Smith Bros.' ranch in January, 1899, would, as a whole, be fairly valued at $2.50 per acre including the improvements and machinery, to which amount was to be added the amount paid in in the

purchase price on the railroad contracts.

13.

A property similar to that of the Smith Bros. Sheep Company containing 13,000 acres with all improvements, situated about ten miles from the Smith Bros. ranch sold in 1902 for $2.50 per acre; while in 1906 a similar plant situated at Martinsdale, very near the ranch of the Smith Bros. Sheep Company and containing 17,000 acres sold for $2.65 per acre, all improvements included.

14.

These same experienced business men and sheep men also testified that a fair price for the sheep of the Smith Bros. Sheep Co., in January, 1899, taken as a whole, would have been $2.50 a head.

15.

On February 13, 1897, William A. Smith died at White Sulphur Springs, Montana, at the age of 53. Wm. A. Smith in his will named N. B. Smith as his executor, who was appointted and qualified April 5, 1897. Wm. A. Smith left practically no cash, only $470.72 in money coming into the executor's hands, [79]

16.

The inventory of the estate of Wm. A. Smith was filed in May, 1897. The valuation of the 122,950 shares of the stock of said company, owned by Wm. A. Smith, at the time of his death, was made by experienced sheep men conversant with the property and the business of the company and placed by them at $61,475.00.

17.

John M. Smith was greatly affected by his broth-

er's death. He was then 63 years old in poor health as was his wife, who was then absent and who wished to go to California to live. McNaught conceived the idea of trying to sell the property. McNaught and Mr. John M. Smith, after discussing the matter of sale with John M. Smith, suggested the idea of a sale to the executor.

18.

From the time the idea of selling was suggested to him, N. B. Smith, the executor, gave it serious consideration; he took frequent counsel with experienced sheep men, who themselves were familiar with the property of the Smith Bros. Sheep Company, as to the advisability of holding on or selling, and if he sold, the price he ought to get for the stock of the estate. Messrs. Moore and Anderson, two of the gentlemen with whom the executor conferred, both say they advised him to sell at a price of $80,000 for the estate stock.

19.

From the beginning John M. Smith had a higher idea of the value of the property than did the executor and the disinterested business men whom the executor consulted. The executor and John M. Smith, differed radically about the price of the property during all the negotiations for its sale. [80]

20.

The first option on the whole property ran to McNaught, who was trying to effect a sale of the property through Henry Klein, of Gans & Klein. The option price was $220,000. The executor considered this price too high, so high in fact, as to for-

bid a sale. No sale was effected under this option.

21.

On January 14, 1898, a petition of the sale of the estate stock was filed, supported by affidavits. The petition named as a minimun price for the stock $75,000, but the executor meant to get all he could for it. John M. Smith did not wish to sell out and leave the children's interest unsold. Both John M. Smith and the executor believed that the stock of the estate of the children would bring more if it were sold in conjunction with that of John M. Smith. On January 24, 1898, the court authorized a sale of the estate stock at not less than $75,000.

22.

On March 25, 1898, the executor, in answer to a letter from John M. Smith, asking what he, the executor, would be willing to take as the least price of the stock of the estate in the event of a sale of the whole property, wrote John M. Smith as follows:

White Sulphur Springs Montana,
March 27th, 1898.

Dear Uncle:—

Your letter in regard to the stock of the estate came to hand. I have been thinking over the matter. I think rather than see a sale go by I would be willing to take EIGHTY FIVE THOUSAND DOLLARS for the stock. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate. I would want the EIGHTY FIVE [81] THOUSAND DOLLARS alone for the stock, and the party who gets the stock

to pay all the debts of the company, and also that the sheep company cancel whatever debts it might have against the Alice or Black Hawk Mining Companies.

Yours truly,

N. B. SMITH.

The executor would not make any fixed price but always insisted on getting his *pro rata* of any sale if a sale of the whole plant was made.

23.

In June, 1898, McNaught was given a new option on the whole plant at a reduced price of $190,000. In this option, while the seller was to keep the wool, he was to bear the expenses of the preceding year.

24.

On July 4, 1898, C. B. Power, after going over the ranch in company with McNaught and Henry Neill, seeing the property and the books, proposed to take an option for fifty days on the entire property on a basis of $200,000 for the property, on the express condition, however, that he should have the wool clip, just being sheared, which sold for $42,184.87, the same to be applied as a credit on the purchase price on the property to be finally taken under the option; and upon the further condition that the company pay the amounts payable during the year on all railroad land contracts. This amount was $3,003.86. This made the real proposed option price on the whole property $154,811.27. John M. Smith declined this proposal for an option.

25.

On August 16, 1898, John M. Smith wrote the executor from Chicago a letter in which he said,

speaking of the Power offer: [82]

"I do not think I am under any obligations to hold for them any longer. They did not accept my offer but made an offer that would not have let us out with $80,000 each if we would accept it, so I have other parties at work that I think will make a deal that will be satisfactory to us all. I will do my level best to bring it about as early as possible. I will pay as suggested beginning the first of September."

The statement, "I will pay as I suggested beginning the first of September," referred to the $200 per month payment to the executor for the privilege of selling the estate's stock with his own at a *pro rata* price. On August 10, 1898, J. M. Smith paid $600 on this selling privilege to the executor. This *pro rata* price N. B. Smith, as executor, always insisted on.

26.

In October, 1898, Tower & Collins, of Miles City, Montana, real estate brokers, advertised the property of the Smith Bros. Sheep Company for sale in newspapers for $200,000 in cash without result.

27.

On November 29th, John M. Smith wrote to the executor from California, as follows:

Pasadena, Cal., Nov. 29.

N. B. Smith,

Dear Nephew:

I received your letter. I was glad to hear that you had a good time at the fair it was such a treat to meet your mother. I had a letter from Miles. He thinks he will make the deal. He asked until the

20th of next month to close it he seemed quite sure about it. I gave him the time asked for. If he don't make it by the 1st of January I will change it. I am quite sure we will make it this spring I will write you again. Mrs. Reynolds has a scheme I referred her to you as I said you had to be [83] governed by the court. Good Bye.

J. M. SMITH.

P. S. We have pleasant weather all the time here now it is at the health resort.

Mrs. Reynolds' "scheme" referred to was an expressed desire by her to get an advance payment for the care of the children (in the event the property was sold) to the extent of $20,000.00.

28.

December 30, 1898, Henry Neill at White Sulphur Springs made the executor an offer of $80,000 cash for the estate's stock. He would not have offered a larger price in March, 1899. The executor told him that John M. Smith had been given an option on the stock that he might sell it with his own and had paid $600.00 thereon; that he would write John M. Smith to see if he wanted to continue it, and if not, would treat with Neill.

This was the only offer that ever was made for the estate's stock. The only other offer, the Power offer, being for an option and made on the whole property.

29.

On December 31, 1898, the day after the Neill offer, N. B. Smith wrote John M. Smith as follows:

White Sulphur Springs, Montana,
December 31, 1898.

Dear Uncle:—

Neill of Helena was in to see me yesterday in regard to the ranch property. He wanted an option on my interest.

I told him I could not give it at this time as I had let you have an option. If you are figuring on Miles making a trade, I think you had better look for other parties. [84] Neill thinks he can sell the property. I am very anxious to do something with the property as I feel that the estate is going to lose money by holding it. Heitman and Danzer have a large number of sheep feeding in east and it is the prevailing opinion of those who know that they will lose from 50 cents to a dollar a head on the transaction. Neill said he would make me a cash offer of $80,000.00 for the estate's interest in the property. If you will make me a cash offer of $85,000.00 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you now owe the company $13,839.35, and that the company will have to commence borrowing money. If you do not take the stock it would be your duty to put your note into the company for the amount so that the company could raise the money on the same to carry on the business. Under our law the only way money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way. Please

let me hear from you in the matter. We are all well. I wish you all a happy new year. I got a letter from Barnes at your place. Give all the Montana people my best regards.

Your Nephew.

This was the first time the idea of J. M. Smith buying the estate stock was ever suggested.

30.

J. M. Smith declined the offered rebate of the $400.00 option privilege money and later paid it and it went to the children. [85]

31.

Prior to the 14th day of January, 1899, John M. Smith wired N. B. Smith, the executor, that he would accept his offer contained in his letter of December 31, 1898.

32.

On January 14, 1899, J. M. Smith wrote the Union Bank & Trust Company as follows:

Pasadena, Cal., Jan. 14, 1899.

Mr. Horge L. Ramsey,

Helena, Montana:

Would your bank lone ninty thousand dollars to me & take the entire stock of the Smith Bros. Sheep Co., as security.

I consider it gilt edge I am about to pay the estates interest. I will only want it ontell I can make a sale of the property perhaps 4 or 5 minutes. Wire me your lowest rate of interest & if can get it wire at my expense all the company owes is the $2,000—

that I sent the note for the other day.

Yues truely,
J. M. SMITH.

Before this letter reached Helena a second two thousand dollar note had been discounted and put to the company's credit in the Union Bank & Trust Company and in addition to this indebtedness there were wages due the employees of the company; the Flatt and Zoeller debts.

33.

On January 16, 1899, John M. Smith wrote N. B. Smith and said, among other things:

"I wired you that I would accept your offer for the stock of the Sheep Plant belonging to the children. I have not heard from Miles yet. If he makes a raise I will pay you the $90,000, if he fails I will give you the $85,000 that you ask." [86]

34.

On January 15, 1899, N. B. Smith wrote J. M. Smith as follows:

White Sulphur Springs, Mont.,
January 16, '99.

John M. Smith,
Pasadena, California.

Dear Uncle:—

Your telegram came to hand in which you said you would take the stock. I want a clear understanding with you so that there may be no hereafter in the matter. It is understood that I am to get eighty-five thousand dollars for the stock and the estate is to have that and not owe the company anything for

money advanced for uncle Bill's estate. Mack wrote me the other day about the four hundred dollars you were to pay, but I will make no claim as to that if you take the property at the above figures. You had better pay a portion down and then I will make the return to the court, I will want the remainder of the money. Please let me hear from you at once in the matter.

Yours truly,

N. B. SMITH.

35.

On January 20, 1899, N. B. Smith wrote Mrs. Reynolds as follows:

White Sulphur Springs, Mont.,
Jan. 20th, 1899.

Dear Aunt:—

Your favor of the 9th inst., came to hand. I will present the matter to the court and get his idea about the matter. I wish you had mentioned the matter before as the order now in force runs for one year from last December. I have made uncle John a proposition on the stock in the company, and that is $85,000.00, cash down. He wrote me he would take it if he could borrow the money. I have talked with a number of good [87] business men about the proposition and all have advised me that I am doing the proper thing. The sheep business is to a great extent a gamble, and I think a good thing and a sure thing is the best. The money put down in Government bonds would keep and educate the children in fine style, and at the end of their time

of minority they would have a nice start in life.

36.

On January 21, 1899, the Union Bank & Trust Company wired John M. Smith, in response to his favor of the 14th instant, that the bank would make him a loan of $90,000 at 9 per cent interest, on the same day they wrote him to the same effect.

37.

On January 22, 1899, J. M. Smith wrote N. B. Smith from Pasadena, California, and in his letter, among other things, he said:

"I will now ask you the amount you wish me to pay down on the property and what interest you want on the balance. I will take the estates stock at the $85,000 and no claim on the estate for any money advanced it at any time. Tell me the least you will take as a down payment and what time you will give on the balance and what interest until paid, and you hold all the property as security. I made you a proposition in my last but don't know how it will suit you. Please give me your best terms as soon as you get this and I will arrange to meet it on the $85,000 basis."

38.

On January 24th, 1899, N. B. Smith wrote J. M. Smith as follows:

White Sulphur Springs, Mont.,
Jan. 24, 1899. [88]

J. M. Smith,
Pasadena, California.

Dear Uncle:—

Your letter of the 16th of Jan. came to hand. I

cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit. You had better forward me a draft for ten thousand and then I will file the petition, and on the approval of sale by the court the balance can be paid. The offer that I had was a cash down offer. If you but (buy) the stock the company can run on just the same and I can act as one of the trustees as I have some stock in my own name. Give my love to all.

Yours, etc.,

39.

On January 27, 1899, J. M. Smith wrote the executor from Pasadena, Cal. In his letter he said:

"I received yours of the 20th and I think your plan good. I will take steps to get the $10,000 down payment and will proceed to business at once. I will write to the bank and arrange for the money. If you have me appointed guardian for the children, as soon as I sell I *won* to invest in gov. bonds all their money and also my own, as I do not intend to try to do any business after I sell out, and I fully intend to let go this spring."

40.

On January 27, 1899, J. M. Smith wrote George L. Ramsey, saying that he had heard from the administrator; that he was [89] now in shape to use $10,000 of the money at once; that he wished to loan for six months with the privilege of paying it

at any time he could before it was due; that he wanted the money to make a payment on the estate of his brother; that the money would be turned over to the administrator, N. B. Smith; that if Ramsey would make a note for $10,000 he would sign and return it; that he would turn it over to the administrator and close the deal and that he would then be the entire owner of the Smith Bros. Sheep Company.

41.

The letter of January 20, 1899, referred to in J. M. Smith's letter to N. B. Smith of January 27, 1899, could not be found. J. M. Smith did not keep his letters. N. B. Smith had no regular letter file.

42.

By registered letter on February 1st, J. M. Smith mailed N. B. Smith his check for $10,000, being the first payment on the purchase of the estate stock. N. B. Smith sent this check through the White Sulphur Springs bank to the Union Bank & Trust Co., with instructions to have the latter bank mail him a certificate of deposit for the amount of the check. This was done. N. B. Smith listed this money among the assets of the estate for the year 1899 and paid taxes on it.

43.

On February 6th, the Union Bank & Trust Company advised J. M. Smith, by letter, that it would be pleased to honor his check for $10,000 when it was presented. The same institution solicited that N. B. Smith, the executor, make that institution his depository for said $10,000.

44.

On February 20th the return of sale was filed and on March 28th the Court approved the sale. [90]

45.

The matter of a guardian for the children had been discussed with Mrs. Reynolds as early as April, 1898, and was considered about the time of the Power offer.

On February 23, 1899, N. B. Smith, the executor, wrote Mrs. Reynolds saying that John M. Smith intended to apply for the guardianship of the children; that under the laws of Montana a child 14 years old could appoint his own guardian; that Willie was about that age; that if he is that old he could appoint whom he wanted and the Court would confirm the appointment; that under our laws a guardian had to be appointed so that the estate could be distributed; that he thought it was his duty to mention the matter to her; that if she had any suggestions to offer he would like to hear from her in the matter.

46.

On March 1, 1899, John M. Smith wrote the Union Bank & Trust Co. In this letter he said:

"If anyone deposits $5,000 to my credit for an option, wire me at once at my expense, 481 El Dorado St., Pasadena, Cal. I cannot say just when I will be called to turn over the $75,000 on the ranch deal. The money will not be drawed out of the bank but left as a credit to the administrator, N. B. Smith. As soon as I am appointed guardian, the money will be turned back to me. I pay interest for what time I have it."

There was never any understanding or agreement on the part of N. B. Smith that the money paid him for the estate stock would not be drawn out of the bank.

47.

On March 28, 1899, the sale was confirmed by the Court [91] and order of confirmation signed and filed. Afterwards on the same day John M. Smith was appointed guardian of the children. He was then in California. Max Waterman was his attorney.

48.

On April 6th, 1899, J. M. Smith signed a check for $75,000 payable to N. B. Smith, administrator, and gave it to McNaught for delivery to him.

On April 27, 1899, a four months nine per cent note of J. M. Smith's for the sum of $75,000 was discounted by the Union Bank & Trust Company, and the proceeds put to his credit. On the same day a $75,000 check to N. B. Smith, administrator, properly endorsed, was presented to, and paid by said bank and charged to J. M. Smith's account. At the same time N. B. Smith surrendered the $10,000 certificate of deposit, dated February 10, 1899, had $5,000 put to his credit on open account and with remaining $5,000 and the $75,000 received on said check bought a certificate of deposit for $80,000 to his order as executor. The $5,000 deposited on open account was fully accounted for.

50.

On April 28, 1899, J. M. Smith, from Long Beach,

Cal., wrote to N. B. Smith and said:

"I return power of attorney with instructions to endorse the stock that I bought of you to the Union Bank as collateral security for the payment of the $10,000 and the $75,000 notes in the bank."

J. M. Smith put up the entire stock of the company as collateral security.

51.

On May 18, 1899, John M. Smith reached Montana from California and by filing his bond on May 25th in the sum of $90,000, taking the oath of office, he qualified as guardian. [92]

52.

On June 1, 1899, the executor filed his final account. On June 12, 1899, the decree of settlement of the final account and of distribution of the W. A. Smith estate was signed, and filed on June 14th. On the last named day the executor paid the entire amount in his hands over to J. M. Smith, the guardian, and took his receipt as guardian therefor.

53.

J. M. Smith proceeded to Helena and on June 17, 1899, applied all the moneys received by him from the executor on the 14th day of June, as far as they went toward the payment of his notes of $10,000 and $75,000, in the Union Bank & Trust Company and gave a new note for the balance. He never told anyone of his purpose so to do nor advised anyone about it. As he had given a bond and put up all the stock of the sheep company besides, he believed he had a right to do it.

54.

On or about June, 1899, J. M. Smith spoke with Judge Armstrong about using the guardianship moneys at 4 per cent.

55.

On April 12, 1900, John M. Smith wrote the Union Bank & Trust Company as follows:

"Pasadena, Cal., April 12, 1900.

G. L. Ramsey, Helena, Mont.:

Sir: I have to report the amount of money & other property I have belonging to the estate of My Brother W. A. Smith. What I want to do is to leave the 247000 shares of the Sheep Co. Stock in the bank it is a Colatrel to represent $84,000—it not to be drawn out or used for enny thing except in case I might happen to die suddenly & a new gardeen be apointed for his children you have all the stock in the Bank now hold it for me for that purpes ontil it is caled for & oblige,

J. M. SMITH." [93]

56.

On December 11, 1900, the order allowing J. M. Smith, the guardian, to use the money in his hands at 3 per cent interest per annum, was made and entered and at the same time Waterman withdrew his name as counsel for the guardian and that of N. B. Smith was entered as attorney for him.

57.

Settlements were made with the children as soon at each became of age, because each one asked for it. No charge for his services as guardian was ever made by John M. Smith.

58.

That the sale of the stock in question was made in good faith for cash and at a price equal to its then market value.

Conclusions of Law [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

1.

As a conclusion of law the Court finds that the sale of the stock in question was valid under the facts as they existed at the time of the sale and should stand; that the plaintiff take nothing by his suit; that his complaint be dismissed and that the defendants have judgment for their costs of suit herein expended.

W. R. C. STEWART,
Judge.

Done in open court at White Sulphur Springs, Sept. 15, 1911.

Filed September 15, 1911.

(Title of Court and Case.)

Judgment [in Smith vs. Smith, etc., in District Court of Meagher County, Montana].

This cause came on regularly for trial on the 26 day of June, A. D. 1911, Messrs. Walsh & Nolan and William Scallon and T. J. Hoolan appearing as counsel for plaintiff and R. Lee Word appearing as attorney for the defendants. The cause was tried before the Court without a jury. Whereupon, in accordance [94] with agreement and stipulation of the parties, the testimony taken in the United States Court for the Ninth Circuit, in the case wherein Nellie Mae Moore was plaintiff, and John

M. Smith, Napoleon B. Smith and Smith Bros. Sheep Company (a corporation), and Mary M. Smith, as executrix of the estate of John M. Smith, deceased, substituted as a defendant for the defendant John M. Smith, were defendants, was read and adopted and with the oral testimony of this plaintiff given in open court was considered as the testimony in this case, and the evidence being closed the cause was submitted to the Court for consideration and decision, and after due deliberation thereon, the Court on this day files its Findings and Decisions, in writing, and orders that Judgment be entered herein in favor of the defendants in accordance therewith.

WHEREFORE, by reason of the law and the Findings aforesaid, it is ORDERED, ADJUDGED AND DECREED, that William J. Smith, the plaintiff, shall not recover anything by reason of this action, and that the defendants have Judgment against the plaintiff for their costs and disbursements incurred in this action, amounting to the sum of seven and 50–100 dollars.

Done in open court, this 15th day of September, A. D. 1911.

W. R. C. STEWART,
Judge of said Court.

Filed September 15, 1911, and recorded in Judgment Record No. "5," at page 131.

Also the opinion of the Supreme Court of the State of Montana, rendered in said cause and reported in 45 Montana Reports, pages 535–582, inclusive; which opinion is as follows:

[Opinion, Supreme Court, Montana, in Smith vs. Smith etc.]

SMITH,

Appellant,

vs.

SMITH et al.,

Respondents.

(No. 3,142.)

(Submitted May 25, 1912. Decided June 10, 1912.)

[95]

(125 Pac. 987.)

EQUITY—ESTATES OF DECEASED PERSONS—MINORS—EXECUTORS AND ADMINISTRATORS — GUARDIAN AND WARD—CONSPIRACY—FRAUD—SALES—SETTING ASIDE—EVIDENCE—INSUFFICIENCY.

Executors and Administrators — Guardian and Ward — Fraud — Sales — Setting Aside — Evidence—Insufficiency.

1. Plaintiff's father willed his property, consisting of stock in a sheep company of which he and his brother were the principal owners, to his minor children. The property thus disposed of was inventoried at $61,475. His executor, an attorney at law and nephew of testator, obtained an order of Court authorizing him to sell the stock for not less than $75,000. Efforts to sell were unavailing. Thereafter testator's brother bought the stock for $85,000, borrowing the purchase money from the bank. The sale was confirmed and the buyer appointed guardian of the minors. The executor having turned over to him, as guardian, the funds thus realized, they were

used by him to liquidate his indebtedness to the bank, obtaining an order permitting him to borrow the money of his wards about a year later. In an action by one of the beneficiaries under the will, evidence examined and held not to disclose such alleged illegal and fraudulent transactions in aid of a conspiracy between the executor and the purchaser (guardian of the minors), as to warrant a court of equity to set aside the sale.

Same—Larceny—Evidence—Insufficiency.

2. Where a guardian who had given ample security to account for all funds coming into his hands as such and who was personally able to raise the amount thereof on demand, under a misapprehension that he had a right to do so, temporarily employed guardianship funds to repay a loan, thus technically appropriating them to his own use, he nevertheless could not be adjudged guilty of larceny under section 8656, Revised Codes, especially where at the settlement of the estate he fully accounted for all moneys paid over to him as guardian.

Appeal from District Court, Meagher County, W. R. C. Stewart, Judge of the Ninth Judicial District, presiding.

Action by William J. Smith against Mary M. Smith as executrix of the last will and testament of John M. Smith, deceased, and others. From a judgment in favor of defendants and an order denying his motion for a new trial, plaintiff appeals. Affirmed.

Mr. William Scallon, Mr. T. J. Hoolan, Mr. T. E. Nolan, and Messrs. Walsh & Nolan, for Appellant, submitted an original [96] as well as a reply

brief; Mr. T. J. Walsh argued the cause orally.

Mr. L. O. Evans, Messrs. McIntire & McIntire, and Mr. R. Lee Word, submitted a brief in behalf of Respondents. Mr. Evans and Mr. Word argued the cause orally.

MR. JUSTICE SMITH delivered the opinion of the Court.

This is a suit in equity, the purpose of which is, in effect, to set aside a sale of 40,983½ shares of the capital stock of the Smith Bros. Sheep Company, made by Napoleon B. Smith, as executor of the last will and testament of William A. Smith, deceased, to John M. Smith in his lifetime, and to obtain an accounting. The plaintiff is a son and one of three heirs at law of William A. Smith, deceased. His two sisters, Annie Maud Kahle, residing in the State of Ohio, and Nellie Mae Moore, a resident of the State of Missouri, are the other heirs at law of their father. A suit, similar to the instant one, was begun in the Circuit Court of the United States for the District of Montana by Nellie Mae Moore; that Court entered a decree in favor of the defendant, which was reversed on appeal by the Circuit Court of Appeals for the Ninth Circuit, the latter court ordering a decree in favor of the complainant, substantially as prayed for. This cause was tried to the District Court of Meagher County, sitting without the aid of a jury. The result was a decree or judgment in favor of the defendants, from which, and an order denying a new trial, the plaintiff has appealed. The action was, by stipulation, submitted to the District Court on a printed transcript of the evidence taken in the case

of Nellie Mae Moore against the defendants, theretofore heard in the Federal Court, supplemented by a brief examination of the plaintiff touching the circumstances under which he made settlement with his guardian, John M. Smith, on arriving at his majority. As stated in the brief [97] of counsel for the appellant, "the cause is before this court, for determination on identically the same evidence on which it was heard in the circuit court of appeals." We therefore take the following statement of facts from the opinion in that case. (See Moore v. Smith, 182 Fed. 540):

"The record shows that for many years John M. Smith and (1) William A. Smith, who were brothers, were the owners of a large amount of land in the State of Montana, upon which they carried on the sheep, cattle and horse business. At first they managed the business themselves, but in 1890 they organized a corporation under the laws of Montana, under the name of Smith Bros. Sheep Company, to which corporation they conveyed all of their property. Each of them was married, and to the wife of each was given 5,000 shares of the capital stock of the company, which amounted to 250,000 shares. The remainder of the stock was divided equally between the brothers. The wife of William A. Smith deserted him in 1891, leaving three small children—the oldest a boy then seven years old, and two younger girls, the older of whom was the complainant in this case and is the appellant here. These children, William A. Smith subsequently sent to live with their aunt, a Mrs. Reynolds, in Ohio, who was a sister of the two brothers. Napoleon B. Smith, who was

their nephew, was an attorney at law residing at White Sulphur Springs, Meagher County, Montana, in which county most of the property of the brothers was situated, and in which they both resided. William A. Smith died there on February 13, 1897, and on his deathbed made his will, which was drawn by Napoleon B. Smith, by which will he left all of his estate to his three children and appointed his said nephew executor thereof.

"During the course of his examination as a witness, John M. Smith was asked what, if any request, his brother William made of him in his last illness regarding his children, and answered: [98] 'A. The last words that he said to me was, "N. B. Smith is my administrator and he will attend to the affairs in that way, and I want you to look after the interests of my children." Those were the dying words that he said. Q. And did you say you would? A. I said I would, and I have, faithfully. At the time of his death William A. Smith was the owner of 122,950 shares of the stock of the Smith Bros. Sheep Company—John M. Smith then owning a majority of the stock.

"The case shows that John M. Smith was himself then in poor health, as was his wife, and that in consequence he spent much of his time at Pasadena, California, where he was at the time of much of the correspondence hereinafter referred to. Some time after the business was incorporated one McNaught, who was a brother in law of John M. Smith, became manager of the property under the supervision and direction of the latter. The will of William A. Smith was admitted to probate, and Napoleon B.

Smith became executor of his estate. After the death of William A. Smith, and because of the age and poor health of John M. Smith, and perhaps from other reasons, both John M. Smith and the executor became desirous of selling the whole property. A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor of the estate of William A. Smith be came desirous that both interests be sold together. Repeated efforts in that behalf failed of accomplishment.

"On the 23d of November, 1897, McNaught asked for an option of purchase, to run until the end of the year, on all of the property, free of debts, except future payments on certain railroad land contracts, on which application J. M. Smith indorsed this: 'My figures is two hundred and twenty thousand, [99] $220,000 Subject to the approval of Mary Smith (wife of John M. Smith) & N. B. Smith to date from Jan. 1, 1892 time to complete sale about to the 10 of Jan. 1898. J. M. Smith.' The executor of the estate of William A. Smith indorsed thereon the following: 'In case a buyer can be found for the property at the amount above stated I will immediately make application to the district court of Meagher county, Montana, to sell the interest of the Estate of W. A. Smith, deceased, in said property at the rate above stated.

(Signed) N. B. SMITH.'

"The evidence shows that the executor regarded the estimate of John M. Smith as to the value of the

property at the time too high, as did others.

"On the 14th of December, 1897, John M. Smith wrote a letter from Martinsdale, Montana, to the executor, which reads in part as follows: 'N. B. Smith Der Sir & Nefue. . . . Mr. McNaught is back from Helena he could not get a party to take hold of the property, but I think the chance will be better next summer I want to sell out so as to go some plase that I can be with my famley & can send Stanley (his son) to school as long as I hold it I can't be sadesfied away from it & I dont want to sell out & leave the childrens interest in it. I think the coming year will be the time to let gow of the intire plant you can at the next turm get a permit to sell wills intrest at anney time that we can get fair value for it then we can go ahead with it when the opertunity Shows up I think it will be well to arange that the text turm of Court I dont think that we will sell much befoar next July or Auges but I dew want to sell as soon as we can to advantage if I was yong I would not cair to sell for it is a good property well managee at what I ask for it." [100]

"The record shows that on the 24th day of January, 1898, the judge of the probate court made an order based upon the application of the executor, authorizing him to sell all of the 122,950 shares of the stock of the company belonging to the estate of William A. Smith, deceased, 'at private sale and without previous notice, provided that said personal property be sold at a sum not less than seventy-five thousand dollars, and may indorse said stock for the purpose of said sale, and may do all other acts and things requisite and necessary to transfer all of the

interest of said estate in and to said stock and the property represented by said stock. That said stock be present at the time of said sale, and that said executor present to this court at the next term thereof after such sale, an account of sale, verified by his affidavit.'

"On the 19th of the following March, John M. Smith wrote a letter from Helena, Montana, to the executor, which is in part as follows:

" 'Mr. N. B. Smith Dear Nefue

" 'I wish to get the least price that you can excep for the children stalk (stock) I may have to dew some figuering to sell the Plant & in case I knawed fest how much I could drop and pay all debts it would give me a chance to handel my self what would you give me a option on the Stock after the debts is payed I think you said the order was for you to sell for $75,000 but we think we can dew better than that. I think I can get them 80 or 85000 out it clear for them now can you name enney price that would soat you to give a opehen on so I might have a maregen to mark (work) on think the matter over & let me know.

" '(Signed) J. M. SMITH.'

"On March 25, 1898, the executor replied as follows: [101]

" 'Office of N. B. Smith, County Attorney, Meagher County.

" 'White Sulphur Springs, Mont.,

" 'March 25th, 1898.

" 'Dear Uncle: Your letter in regard to the stock of the estate came to hand. I have been thinking

over the matter. I think rather than see a sale go bye I would be willing to take $85,000 for the stock. I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate. I would want the $85,000 alone for the stock, and the party who gets the stock to pay all the debts of the company, and also that the sheep company cancel whatever debts it might have against the Alice or Blackhawk Mining Companies.

" 'Yours truly,

" '(Signed) N. B. SMITH.'

"On July 2, 1898, John M. Smith wrote to the executor as follows:

" 'Smiths Ranch July 2 1898.

" 'N. B. Smith Dear Nefue

" 'I have been figerin since you laft on this Sheep Sale you know that our Judgment difers as to the value of the property you being willen to take less than would satiesfy me & thaught that you would rather than miss a sail would take $80000 for the pert you represent rether than miss a sail it was on that bases that I made my offer to Mc My offer gave me a margeen that would sadesfy me but I dont have a small margen it cuts me down so low that I dont feal sadesfiged if I had made my figers with the intent of giving you the benefit of my Judgment I should have plase my figers higher than I did so you can see that your astemate throwed me off in my calculation & will bring me out with less money than is sadesfactery to me & Mary I told her as you was willing to take less than I thought the stock worth & I was

willing to take 80000 that I would have a [102] margin to work on & best my offer acorded now under theas circumstances I think you can afeard to take $84000 as your figers estemate 85000 now if I can have a small margen to work on as I dont know jest what it will take to Squair all debts but I think if I can get yours at $84,000 that I will still have a small margein to work on if this deel goes but I would not be sadesfied to take the offer & devide equal as our Judgment difered as to value I made the offer below what I should have done if I had not had some aserence that you would take 80000 for the interest now if you think you can take 84000 I think that will be very close to to it if the sail goes if you cant aford to take that Mary may not sell her stock & and that will spoil the sale if enny can be made atall. let me know at onse So I cam caluculat acorden.

" 'Your uncel,

" 'JOHN M. SMITH.

" 'If we dont sell this time we may get that much.'

"December 30, 1898, came without the effecting of any sale, although strenuous efforts in that behalf were made by John M. Smith (to one Miles, among others) as well as by McNaught. On the day last mentioned Henry Neill made to the executor the cash offer of $80,000 for the stock belonging to the estate. The next day the executor wrote to John M. Smith this letter:

"'Office of N. B. Smith, County Attorney, Meagher County,

"'White Sulphur Springs, Mont.,

Dec. 31st, 1898.

"'Dear Uncle: Neill of Helena was in to see me yesterday in regard to the ranch property. He wanted an option on my interest. I told him I could not give it at this time as I had let you have option. If you are figuring on Miles making a trade I think you had better look for other parties. Neill thinks he can sell the property. I am very anxious to do something with the property as I feel that the estate is going to lose money [103] by holding it. Heitman and Danzer have a large number of sheep feeding in east and it is the prevailing opinion of those who know that they will lose from 50 cents to a dollar a head on the transaction. Neill said he would make me a cash offer of $80,000 for the estate's interest in the property. If you will make me a cash offer of $85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you now owe the company $13,839.35, and that the company will have to commence borrowing money. If you do not take the stock it would be your duty to put your note in to the company for the amount so that the company could raise the money on the same to carry on the business. Under our law the only money can be drawn out of a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way. Please let let me hear from

you in the matter. We are all well. I wish you all a happy new year. I got a letter from Barnes at your place. Give all the Montana people my best regards.

Your nephew.'

"On the 14th of January, 1899, John M. Smith wrote to Mr. George L. Ramsey, cashier of the Union Bank & Trust Company, Helena, Montana, this letter:

" 'Pasadena, Cal., Jan. 14, 1899.

" 'Mr. George L. Ramsey, Helena, Mont.

" 'Would your bank lone ninty thousand dollars to me a& take the entire stock of the Smith Bros Sheep Co as security. I consider it gilt edge I am about to buy the estates intrest I will onley want it ontell I can make a sale of the property perheps 4 or 5 months. Wire me your lowest rate of intrest & if I can get it wire at my expense all the compny owes is the [104] $2000—that I sent the Note for the othr day. Yeus Truly

" 'J. M. SMITH.'

"Two days thereafter, to wit, January 16, 1899, John M. Smith wrote from Pasadena, California, to the executor at White Sulphur Springs, Montana, as follows:

" 'N. B. Smith Dear Nefue W. S. Springs I wired you that I would except your offer for the Stock of the Sheep plant belonging to the children I have not herd from Miles yet if he makes a raise I will pay you the $90000 if he fails I will give you the $85000 that you aske you of corse would put it in goveoment bonds if you had it now to make things safe & you be absolutely safe I will give you all of the

Sheep Company Stock to hold as security for the payment of the $85000 & I will pay the same interst that you would get on Gov bonds & pay you 3 times per year ontill I can sell out to advantage then you will be safe & if enny one is looser it will be me & I am willing to take the chances they never will be a time but what the hole business will bee the best security for that amount but I dont intend to hold it very long at enny time that I can make a good sale I will pay off your $85000 I think this the best way for us to close up business I intend never to run less than 40000 head of sheep on the ranch as long as I have ennything to dow with it by you holding all the stock as Secutivy no one could com in ontill your Notoe is payed first I never tried to get in debt much enny more as I intend to keep close payed up all land payments & Taxes & keep the Smith Bros Sheep Co Cr as good as has always bin you can get up the papers so you ar safe & at the same time gives me a chance to handel my self to advantage f if Miles fails you & Mac can fix things so that I will not have to come ontil Apr or May or may you can send the Papers [105] down hear for I and Mary to signe I will pay all revenewe Stamps requires I don't think you will have to pay taxes on the $85000 while it is repsented by the Smith Bros Sheep Co Stok as I have to pay on all the property if you did have to pay taxes I will agree to pay it for you Si it will leave it just the same as gov bonds now I hope you will consider this & after Feb the first proceed to fix up the papers or soaner if you wish I could borrow the money of the Bank of Helena by giving the sae seciorty but I would soaner deel with you & you ar

jest as safe as tho you had gov bonds let me hear from you at once & oblige

" 'Your uncel JOHN.'

"On the same day, to wit, January 16, 1899, the executor wrote from White Sulphur Springs, Montana, to John M. Smith at Pasadena, California, the following letter:

" 'Office of N. B. Smith, County Attorney, Meagher County,

" 'White Sulphur Springs, Mont.,

Jan. 16, 1899.

" 'John M. Smith, Pasadena, Cal.

" 'Dear Uncle: Your telegram came to hand in which you said you would take the stock. I want a clear understanding with you, so that there may be no hereafter in the matter. It is understood that I am to get $85,000 for the stock and the estate is to have that and not owe the Company anything for money advanced for uncle Bill's estate. Mack wrote me the other day about the four hundred dollars you were to pay, but I will make no claim as to that if you take the property at the above figure. You had better pay a portion down and then I will make the return to the court, and if the court approves of the sale, of which I have no doubt, I will want the remainder of the money Please let me hear from you at once in the matter.

" 'Yours truly,

" 'N. B. SMITH.' [106]

"The record shows that on the 20th of January, 1899, the executor wrote to John M. Smith a letter which in some way disappeared, and is not produced. Before it could have been received at Pasadena, Cal.,

John M. Smith wrote from that place to the executor this letter:

" 'Pasadena, Cal., Jan. 22, 1899.

" 'N. B. Smith.

Dear Nefue. I received yours of the 16 in reply to my telegram, I had written 2 letters that you have no dout received befoar this in which I asked turms but have not herd from either yet it don't look as tho Miles is going to make a deel. I now will ask you the amount you wish me to pay down on the property & what interst you want on the balence I will take the astates Stock at $85000 and no claim on the astate for enny money advanced it at enny time tell me the least you will take as a down payment & what time you will give on the balance & what interst ontill payed & you hold all the property as security I made you a propersition in my last but don't know how it will soat you pleas give me your best turms as soan as you get this and I will arange to meet it on the $85000 bases. Yours Truly. Your Uncle John. I think the coart will aprove of the security & offer for the balence I know your Bondsman would I don't think that it will take me longer then May the first to make some turn. So I will get the balance for you.'

"On the 21st of January, 1899, Mr. Ramsey, cashier of the Union Bank & Trust Company, of Helena, Montana, wrote this letter to John M. Smith:

" 'Mr. J. M. Smith, Pasadena, California.

" 'Dear Sir: In response to your favor of the 14th, we have wired you to-day that we would make the loan of $90,000 at 9% interest. We suggest in the

telegram, however, that the offer to make would be based upon whether or not you should use the money at once. Unless you could take it right away, we [107] would not, of course, want to carry so large a sum here for any particular length of time, awaiting investment. I really hope you will be able to use it. If you have not telegraphed us at the time this letter reaches you of your conclusion as to whether or not you can use the money, we want to ask you to do so, as the loan is a large one and we might have to loan the funds elsewhere, which we would not do, in anticipation of your possible call for these funds.

Yours respectfully,

" 'GEORGE L. RAMSEY, Cashier.'

"That John M. Smith replied by wire to the letter last quoted that he did not want the money is shown by this letter from Ramsey of date January 28th, 1899:

" 'January 28, 1899.

" 'Mr. John M. Smith, Pasadena, Cal.

" 'Dear Sir: We now have your telegram reading: 'Do not want money,' which is interpreted to mean that you are not in a position to use the money just at the present time. But that you may possibly desire to later. If our surmise is correct, I beg to advise you that we will be glad to figure with you whenever you are ready; but we would not of course want to promise so large an amount of money at any time in the future as it is a considerable sum and we may have to invest it elsewhere. Just at this time we would be very glad to make the loan and it is pos-

sible we may be in the same position whenever you get ready. Yours respectfully,

" 'GEORGE L. RAMSEY,

" 'Cashier.'

"January 24, 1899, the executor wrote to John M. Smith at Pasadena, California, as follows:

" 'N. B. Smith, County Attorney, Meagher County.

" 'White Sulphur Springs, Mont.,

" 'Jan. 24, 1899. [108]

" 'J. M. Smith, Pasadena, California.

" 'Dear Uncle: Your letter of the 16th of Jan. came to hand. I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit. You had better forward me a draft for ten thousand and then I will file the petition, and on the approval of sale by the court the balance can be paid. The offer that I had was a cash down offer. If you but (buy) the stock the company can run on just the same and I can act as one of the trustees as I have some stock in my own name. Give my love to all.

" 'Yours, etc.'

"Before the letter last quoted could have been received, John M. Smith wrote from Pasadena to the executor as follows:

" 'Pasadena, Cal., Jan. 27.

" 'N. B. Smith:

" 'Dear Nefue: I received yous of the 20 & I think your plan good I will take steps to get the ten thousand down payment & we will proceed to business at

once I will write to the Bank & arange for the money if you have me appointed garden for the Children as soon as I sell out I uou & ('Want to,' according to original exhibit) invest in Gove bonds all thair money and also my one as I don't intend to try to dew enny business after I sell out & I fully intend to let goew this spring I think your sugjestion a good one I think I should have the children come out hear the schools is first clas & the climat is good also good society. Yous Truley

" 'J. M. SMITH.

" 'will wright agane soon.' [109]

"On the same day, to wit, January 27, 1899, John M. Smith wrote from Pasadena, California, to Ramsey, this letter:

" 'Pasadena, Cal. Jan. 27, 99.

" 'G. L. Ramsey Helena Mont.

" 'I received yours of the 23 in regard to the mony I did not want it all at once. I received a letter today from the administrator & now I am in shape to use ten thousand of the money at once. I wish the lone for 6 months with the understanding that I have the privilege of paying it at enny time I can befour it is dew intrest to be at the same for what time I have used the money. You understand I want the money to make a payment on the estate of my brother the money will be turned over to the administrator N B Smith at White Sulphur Springs if you will you can make out a Note for ten thousand & send it hear to me I will signe & return then I will turn it over to the admnestratr & close a deel then I

will be the eentier oner of the Smith Bros Sheep Co.

" 'Yous respetfuly,

" 'J. M. SMITH.'

"Four days thereafter, to-wit, January 31, 1899, John M. Smith wrote to Ramsey as follows:

" 'Pasadena, Cal Jan 31 1899.

" 'George L Ramsey Helena

" 'Sir: I have taken the liberty of drawing a check on your Bank for ten thousand Dollars $10,000—in favor of N. B. Smith of White Sulphur Springs the adminestratr of my Brothers astate I dont think that the money will be caled for onley plast to his cr. I inclose his letter so you can se how we intend to manage so that I din't think we will have to call for enny of the money will leave it as a creddet for when I am apointed gardeen of the children I will turn it all back to the Bank and pay what intrest has acrued for what time we have the [110] money. hoping this will meat your aprovel I wrote you a letter a few days ago asking you to forward me a Note for $10,000—for me to signe but I have not received it yet hoping you can favor me with my request & oblige.

" 'J. M. SMITH.'

"On the 2d of February, 1899, Ramsey wrote to John M. Smith, as follows:

" 'Mr. John M. Smith, Pasadena, California.

" 'Dear Sir: We enclose you herewith a blank note for $10,000, sent agreeable to your favor of the 27th, drawn for six months, with the understanding that you shall have the privilege of taking it up at any time prior to maturity if you like, interest to be charged only for the actual time the money is in use.

I also inclose several blank notes, which can be filled up by you at any time the money is needed. With regards, I am, Yours respectfully,

" 'GEORGE L. RAMSEY,

" 'Cashier.'

"On February 6, 1899, Ramsey wrote to John M. Smith as follows:

" 'Mr. J. M. Smith, Pasadena, California.

" 'Dear Sir: We now receive your letter of January 1st (31st) and beg to advise that we shall have pleasure in honoring your check for $10,000, when it shall be presented. We return herewith letter from N. B. Smith. With regards, I am,

" 'Yours respectfully,

" 'GEORGE L. RAMSEY,

" 'Cashier.'

"On February 6th Ramsey also wrote to N. B. Smith this letter:

" 'Union Bank & Trust Company of Montana.

" 'Helena, Feb. 6, 1899. [111]

" 'Mr. N. B. Smith, White Sulphur Springs.

" 'Dear Sir: Receiving a letter to-day from Mr. J. M. Smith, advising that he had drawn on us for $10,000 in your favor, and this letter indicating that he would probably draw further checks, I am lead to suggest that we would be very happy indeed to serve you as a depository, for all or a part of the proceeds of the check, if it is in your plans to leave it on deposit. Yours respectfully,

" 'GEORGE L. RAMSEY,

" 'Cashier.'

"On the 8th of February, 1899, John M. Smith wrote to Ramsey as follows:

"'Pasadena Cal Feb 8 1899.

"'G L Ramsey yours of the 2 came to hand last night I hear sign & return Note. When I am caled on for the balence I will fill out & sent on Notes to cover the balence of the perches. I dont think that one dollar of it will be caled for except as a credit with me. Many thanks for your acomedation.

"'Yours Truely

"'JOHN M. SMITH.'

"On the same day, to wit, February 8, 1899, the executor wrote from White Sulphur Springs, Montana, to the Union Bank & Trust Company, as follows:

"'White Sulphur Springs, Mont.,

"'Feb. 8th, 1899.

"'Union Bank & Trust Co., Helena, Mont.

"'Gentlemen: I don't know yet what disposition I will make of the money that J. M. Smith will place to my credit. I would want a certificate of deposit payable on demand. If my Mr. Smith is appointed guardian this money will be turned back [112] to him. I will make no arrangements about the money at this time as I want to get the estate settled up as soon as possible Yours truly,

"'N. B. SMITH.'

"On February 10, 1899, a certificate of deposit for $10,000 was issued by the Union Bank & Trust Company, and sent to the executor, with a letter of that date in which the bank said: 'We are this morning placed in possession of your favor of the 8th instant

and having instructions from the First National Bank of White Sulphur Springs to send you certificate of deposit for J. M. Smith's check of $10,000, we are now having pleasure in handing you same herewith. We note that you do not care to make arrangements about the money at this time, as it is your desire to get the estate settled as soon as possible.'

"On February 12, 1899, the executor wrote to the Union Bank & Trust Company this letter:

" 'White Sulphur Springs, Mont.,
" 'Feb. 12, 1899.

" 'Union Bank & Trust Co., Helena, Montana.

" 'Gentlemen: Your favor of the 10th enclosing draft for $100000 ($10,000) came to hand. I am much obliged to you for your kindness in the matter. I presume I will leave the money with you for the present, as I have no use for it. If my uncle is appointed guardian of the children, then in that case, the money will all be turned back to him as guardian. I think I can wind up the estate within three months. I shall be pleased to meet you when I come to Helena which may be some time in this month.

" 'Very respectfully,
" 'N. B. SMITH.' [113]

" 'The executor proceeded to make application for the confirmation of the sale of the stock, and engaged, in behalf of John M. Smith, an attorney named Waterman to make application for the appointment of John M. Smith as guardian of the children, the return of sale being filed with the court by the executor on the 20th of February, 1899, and three days

thereafter, to wit, February 23, John M. Smith's application for his appointment as guardian of the children was filed by Max Waterman as his attorney. On that same day, to wit, February 23, 1899, the executor wrote to Mrs. Reynolds this letter:

" 'Office of N. B. Smith, County Attorney, Meagher County,

" 'White Sulphur Springs, Mont.,

" 'Feb, 23, 99.

" 'Dear Aunt: Uncle John intends to apply to be the permanent guardian of the children. I presume you will be notified in the matter. Under our law a child that is fourteen years of age can appoint his own guardian. I think Willie is about that age. If he that old he can appoint who he wants and the court will confirm the appointment. Under our law a guardian had to be appointed so that the estate can be distributed. The estate will have to go into the hands of a guardian so that it can be invested in bonds. Uncle John's address is 481 Eldorado Street, Pasadena, California. He will have to give a bond to the amount of about ninety thousand dollars. I don't think he will make any change in the case of the children, and he can't make any change after the children become 14 years of age for then they can appoint their own guardian. I thought it my duty to mention the fact to you so that you might understand the proceedings and why they were taken. You see I will have the eighty-five thousand dollars, and the same must be invested which I could not well do as executor. It was uncle Will's desire that you should look after the children and that desire will no

doubt be carried out. I have explained fully because I [114] thought you might worry in the matter. If you have any suggestion to offer would like to hear from you in the matter. Give my love to the children. Yours etc.

" 'N. B. SMITH.'

"On the 1st day of March, 1899, John M. Smith wrote from Pasadena, California, to Mr. Ramsey at Helena, Montana, as follows:

" 'Pasadena, Cal., March 1, 1899.

" 'George L. Remsey Helena Mont. If enny one deposits $5000—to my cr for a option Wire me at once at my expen 481 El Dorado St Pasadena Cal. I cant say jest when I will be cald to turn over the other $75000—on the Ranch Deele. the Money will not be drawed out of the Bank but left as a cr to the adminestrater N. B. Smith as soon as I am appointed gardeen the money will be turne back to me I pay intrest for what time I have it. Will I have to send my note or can you pay my check by Cr to N. B. Smith for the amount & he leave it in the bank & transfer it back to me.

" 'Yous Tuely

" 'J. M. SMITH.'

"March 10, 1899, the Union Bank & Trust Company wrote to N. B. Smith this letter:

" 'Union Bank & Trust Company.

" 'Helena, March 10, 1899.

" 'Mr. N. B. Smith, White Sulphur Springs.

" 'Dear Sir: As you are perhaps aware, we had made arrangements with Mr. John M. Smith to advance him the sum necessary to purchase the *the* es-

tate's half interest in the Company. He writes us by letter received to-day, as follows: 'I can't say just when I will be called to turn over the other $75,000 on the ranch deal.' The amount to be advanced on this transaction [115] is a large one, and we like to figure ahead a little bit, so that we may calculate at all times upon the amounts which we have arranged to advance to our several customers, and I am going to take the liberty of inquiring whether you can tell us at this time about when the balance will be called for, so that we can figure accordingly. We felt quite a bit complimented at your making us your depository for the payment that has already been made by Mr. Smith, and I assure you we will be happy to serve you in the future as well.

"'Yours respectfully,

"'GEORGE L. RAMSEY,

"'Cashier.'

"On the 28th of March, 1899, the sale of the stock of John M. Smith was confirmed, and the order of confirmation signed and filed. On the same day, to wit, March 28, 1899, John M. Smith, who was then in California, was appointed guardian of the persons and estates of the minors, the order made and filed reciting due notice of the application, and directing 'that letters of guardianship of the persons and estates of said minors be issued to him upon his giving a bond to each of said minors in the penal sum of thirty thousand dollars, and upon his taking and subscribing the oath according to law.'

"On the 18th of April, 1899, John M. Smith, wrote

from Pasadena, California, to Mr. Ramsey, at Helena, Montana, as follows:

"'Pasadena, Cal Apr 1899.

"'Mr. G. L. Ramsey Helena Mont

"'I will be in Helena about the 18 of May. I leave hear the 13 then I will be ready to straten out business sadsfactry I hope I will have McNaught send the Stock over to the Bank so it will be thair when I get back I will have N B Smith meet me in Helena & then we can fix up every thing sadesfactory I drew [116] a check to N. B. Smith for $75,000 —but I dont think he will Send it in Ontill I get back.

"'Yours Truely

"'N. M. SMITH.'

"April 24, 1899, the bank replied to John M. Smith by letter, saying: 'We are ready to honor your check for $75,000 when Mr. N. B. presents the same.'

"On the 27th of April, 1899, a four months note for $75,000 of John M. Smith, bearing 8 per cent interest, was cashed by the Union Bank & Trust Company, and the proceeds put to his credit, with which the bank paid the $75,000 check which John M. Smith had given upon it to the executor, and which was by the executor indorsed, such payment being then charged by the Bank & Trust Company to John M. Smith's account. The before-mentioned $10,000 certificate of deposit was at the same time surrendered by the executor, who took from the Bank & Trust Company a certificate of deposit to his order for $80,000 and deposited $5,000 of the amounts mentioned to his personal credit; $2,161.49 of which he paid himself as due him 'on the sale of property,'

and the balance to other persons and for other purposes.

"On the 28th of April, 1899, John M. Smith wrote from Long Beach, California, to the executor, this letter:

"Long Beach, Cal., Apr. 28, 1899.

"'N. B. Smith:

"'Dear Nefue I return Pour of atorney (appointing N. B. Smith John M. Smith's attorney in fact) with instictions to indors the stock that I bought of you to the union Bank as colateral security for the payment of the $10,000 & $75,000 nots now in the bank. I am booked to leave hear the 13 of May for Helena will arrive about the 17 or 18 & want you to meat me in Helena at that time If I should decide to make it later [117] I will wire you to that afect. . . .

"'Yors Truly our love to orseal.

"'J. M. S.'

"John M. Smith returned to Montana from California on the 18th of May, 1899, and on the 25th of the same month executed his bond as guardian and took the oath of office and filed them with the court. June 1, 1899, the executor filed the final account of his administration of the estate of William A. Smith, and on the 12th of June of the same year a decree settling the account and distributing the estate was signed and on the 14th of June, 1899, placed upon file, the decree providing, among other things: 'That the said executor shall be finally discharged from his duties as such executor upon his filing a receipt for the residue of said personal property duly signed

by John M. Smith as guardian of William Smith, Nellie Mae Smith, and Annie Maud Smith, minor children of said deceased, and upon the filing of such receipt his bondsmen as such executor shall be discharged.'

"On the same day, to wit, June 14, 1899, the executor paid the entire amount in his hands over to the guardian, John M. Smith, and took his receipt therefor as such guardian, whereupon an order of final discharge of the executor was signed and filed. John M. Smith thereupon went to Helena,Montana, and on the 17th of June, 1899, there used the money of his wards so received by him in discharging his indebtedness to that bank, as far as it would go, giving a new note to the bank for the balance due it from him. John M. Smith was questioned in respect to that matter when upon the stand as a witness in this cause, and gave this testimony:

" 'Q. Mr. Smith, I believe you said this morning that you had used the money turned over to you by Mr. N. B. Smith when you were appointed guardian, to pay your notes at the bank? [118]

A. I did.

" 'Q. Was the money cash that he turned over to you, or was it certificates of deposit? A. It was a certificate of deposit; it wasn't counted out as cash, but it was a credit certificate of deposit that he turned over to me when I qualified as guardian, he turned it over to me as administrator. I done business with the bank here, and I will refer to them. I cannot remember just about how it was done at the time, but I will refer you to the bank and Geo. L. Ramsey;

they are better authority than my memory is, a great deal.

" 'Q. I will state, Mr. Smith, for your information, that these two certificates of deposit were produced here by the bank officers. A. The certificates of deposit were turned over to me as guardian of the children of William Smith by the administrator.

" '*Q. I will state, Mr. Smith, for your information, that these two certificates of deposit were produced here by the bank officers. A. The certificates of deposit were turned over to me as guardian of the children of William Smith by the administrator.*

" 'Q. And you turned them into the bank in payment of your note? A. I thought I had a right to.

" 'Q. But you did? A. I did, I thought I had a right to, because I gave security for the amount.

" 'Q. Did you understand when you did that that you were using money of minors for your own purposes? A. I understood I was using it, and that I had a right to; I didn't talk with anyone about it.

" 'Q. You thought that you had a right to take the money of minors and use it to pay your debts? A. As I had given security for that money, it was the same as though it was in my possession. [119]

" 'Q. Do you understand that you, as a guardian, had the right to use guardianship money, the money of minors, to pay your own debts and for your own personal account? A. I may have made a mistake, but I didn't do it with the intention of defrauding anybody; I might have made a mistake.

"'Q. But you knew what you were doing? A. I knew I was paying off my indebtedness.

"'Q. And using the money of minors? A. The money that was given security for.

"'Q. Without asking anybody's permission? A. Without asking anybody's permission.

"'Q. Without consulting anybody? A. I didn't do it with the intention of defrauding anybody, and if I have wronged anybody in any way I am willing to make it right.

"'Q. Was it your view at that time that you as guardian had a right to do such a thing? A. I thought this way: that it was just the same as if I put it in government bonds if I paid the same interest. I acknowledge it may have been wrong, but I didn't do it with the intention of defrauding anybody. I paid off my note, and that is the condition of things just as they were.'

"N. B. Smith, the executor, testified that he did not know until the fall of 1899 what use the guardian had made of his wards' money; that "in October, or before October, 1899, the guardian told him. He also testified in answer to the question, 'Did you report the fact to the judge of the court that the money you had given to John M. Smith, turned over to him as guardian, had been used by him to pay off his own debts?' 'I made no such report whatever.'

"On the 20th of November, 1899, N. B. Smith wrote to Mrs. Reynolds this letter: **[120]**

" 'Office of N. B. Smith, County Attorney, Meagher County.

White Sulphur Springs, Mont.

Nov. 20, 1899.

" 'Mrs. D. B. Reynolds, Fayette, Ohio.

" 'My Dear Aunt: Enclosed find draft for four charges for looking after and caring for the minor children of Uncle Bill, until December 1, 1899. Please sign the enclosed receipt. In regard to uncle John buying the stock will say that he borrowed the money from a bank in Helena to buy the stock. I would not let him have the stock until he had actually paid me the money. I had the money in my name in the bank until I was finally discharged from my trust. When I made my final account I showed the judge the draft, and my bank account subject to check. I turned over to him the money and took his receipt for the same, and filed the same in court and the same is now a matter of record. The Union Bank & Trust Company furnished his bond and same is perfectly good. He had to pay the bank quite a sum of money for furnishing the same. I think he has to pay about three hundred dollars a year for his bond. The judge and uncle John and I talked over the matter of the use of the money, and the understanding was that he should pay four per cent for the use of the money until such time as it should be invested in bonds. That is better than we could do with government bonds, and as long as the Union Bank & Trust Company is his surety the same is perfectly safe. Nothing has been said as to the compensation that the court will allow him. I think

the compensation would be arrived at in this way, he would be allowed his actual expenses in looking after the children, and a reasonable amount for what time spent in looking after the children and their estate, and the costs connected with the court procedure. In cases of administrators the law fixes the compensation at a certain per cent based on the value of the [121] estate. I don't think the court would fix his compensation at anything unreasonable. Uncle Bill reposed confidence in me and I think I did the best thing for his children that could have been done in making the same. Before making the sale I talked with the best business men of the county in relation to the matter, and not one but what told me to close the sale as I had made a great deal. Although I am no longer administrator, yet I shall always look after their interests. . . .

" 'Your nephew.'

"Both John M. Smith and N. B. Smith gave some testimony tending to show that in 1899 the former had some talk with the judge of the court in which the guardianship matter was pending, about his (John M. Smith's) using the money of the minors and paying interest on it at the rate of four per cent per annum.

"In December, 1900, this order was made and entered in the matter of the estate and guardianship of the minors:

" 'Probate Minutes, December, 1900.

" 'Tuesday, the Eleventh day of December, 1900.

" '255.

" 'Estate and Guardianship of WM. SMITH et al., Minors.

" 'Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about $82,000 at the rate of three per cent per annum. The court being fully advised in the premises: It is ordered that said guardian be authorized to borrow said sum of $82,000 at the rate of 3% per annum, and to so hold the same at said interest until the further order of this court.'

[122]

"N. B. testified that he did not procure this order to be made, and did not know of it at the time. He admits in his testimony that he thereafter acted as the attorney for the guardian, and prepared the final account of the latter in which the wards were charged for the money paid by the guardian to the surety company for going on his bond as guardian, and in which also the guardian was charged interest on the money of the wards only from December 11, 1900, and at the rate of three per cent per annum, but claims that, as respects the interest, his doing so was an inadvertent mistake.

"In regard to his guardianship attorney John M.

Smith was *question* and answered as follows:

"'Q. Who was your lawyer in the guardianship matters? A. Waterman for about a year and a half or two years. I forget about it, but Waterman acted as my attorney.

"'Q. Max Waterman, of White Sulphur Springs? A. Yes, he used to assist me about court matters and get the accounts in and accepted. I didn't know anything about the business myself. Badger made out some first of it, and Waterman acted later on, and after that I had N. B. Smith. He was fairly conversant with everything, and I knew he would do the square business by all the parties concerned and so I got him after that—after Waterman.'

"And there is in the record this letter from John M. Smith to Mr. Ramsey, of date October 15, 1900:

"'Martinsdale, Mont., Oct. 15, 1890 (1900)

"'Geo L Ramsey Helena I have sent to the Springs to have N. B. Smith fill out my report as Gardien of Brother William he is my attorney & Keeps My accounts it will be in in a few days as filed in caar. Yours Treuly

"'J. M. SMITH.' [123]

"The appellant was but ten years old when the stock was sold, and became eighteen on the 27th of August, 1906. On the 5th of November of the same year her guardian paid her the amount shown to be due her by his final account, which had been approved by the probate court.

"In the deposition of the complainant which was introduced on the trial of the cause, she was asked, among other things, what information she had re-

garding the sale of the stock, when her guardian settled with her in November, 1906, to which interrogatory she answered: 'I knew that the sale had been made, of course, and I knew that uncle John had been the purchaser—that is all I knew. I knew nothing about the stock company or the incorporation of the company. I received my money, and that was all I knew about it—what he gave me.' Being asked what knowledge she had at that time regarding the method, validity and good faith of the sale of the stock, she answered: 'I had no knowledge of its method, its validity, or of its good faith, and knew nothing about their intentions.' In response to the interrogatory, 'What was told you by your uncle, John M. Smith, or your cousin, Napoleon B. Smith, the above-named defendants, about your affairs, and particularly about the sale of said stock?' she answered: 'Nothing was told me by either John M. Smith, or Napoleon B. Smith, concerning the estate in any way—unless I asked directly, and I never talked to "Poly" about my affairs very much, but I have spoken to Uncle John—he always avoided me or would talk in an indirect way, and I knew no more when I finished than when I begun. He didn't seem to care about discussing it very much—he didn't want me to think much about it. I once asked him about the difference between his estate and ours and why he had more than we had and he said, "Papa owed large sums of money when he died, and they had to be paid off." I also spoke about the three per cent [124] which was paid us on our money, and asked him why he didn't give us more—he said,

"It was all he could afford." "Poly" never told me anything at all, except what we had, and in fact intimating that we ought to be thankful for what we got.'

"Both John M. Smith and N. B. Smith were questioned in respect to conversations they had with the complainant. John M. Smith gave this testimony:

" 'Q. Do you remember when the complainant in this suit came out to the ranch at the time of the settlement? A. I don't remember the date, but it was in August, I think.

" 'Q. Of what year? A. The 27th of August.

" 'Q. Of what year, I said? A. 1906.

" 'Q. About how long was she there? A. Well, she wasn't there long. I can't remember, but it wasn't but a few days.

" 'Q. What occurred in her matters while she was there? A. N. B. Smith, I think was down there, and was talking about her loaning money. There was a party wanted to borrow the money.

" 'Q. Was there any settlement made with her? A. The settlement wasn't made at the ranch.

" 'Q. Where was it made? A. At White Sulphur Springs.

" 'Q. Was it made that year? A. Yes, sir. I wasn't present at the settlement. N. B. Smith done the entire business, he and the court, as I recollect it.

" 'Q. Do you recall any talk when N. B. Smith was down at the ranch and the complainant was down at the ranch, about her affairs? A. I cannot recall just what it was, no. They had some talk, but I cannot—

" 'Q. Where did they have it? A. In the office.

" 'Q. Who was present? A. I don't know as I could say exactly who was present. [125]

" 'Q. Was the complainant present? A. The complainant was present.

" 'Q. Was N. B. Smith present? A. N. B. Smith and myself.

" 'Q. Were you present? A. Yes, sir, and I think Mr. Flatt and I think probably my wife was. I don't know whether she was or not. I know at the time she was there it was talked over, but I can't recall the conversation.

" 'Q. What was talked over—what was it about generally? A. It was talked about what was best for her to do with the money, as near as I can remember.

" 'Q. Was there any talk about the matter of your purchase of the stock of the company? A. I don't remember that that was talked over, but it might have been; I don't remember.

" 'Q. Was there any explanation given her of her matters and how the results and amounts due her were arrived at? A. I think that N. B. Smith gave her full information in regard to it. I think so, as near as I remember, but I cannot recall what it was.'

"N. B. Smith was also questioned in respect to the same matter, and also in respect to a visit of the complainant to Montana in 1904, when she was about sixteen years old, as follows:

" 'Q. Do you recall when the plaintiff came out to

Helena in 1904? A. Yes, sir; I recall when she came out here.

" 'Q. Where did she stop, if she stayed at all in White Sulphur Springs? A. Well, she stopped with us a few days.

" 'Q. At your home? Yes, sir, at our home.

" 'Q. With yourself and wife? A. With myself and wife.

" 'Q. And during that time, was any explanation given to her of these matters about which you have been testifying? A. Yes, sir. [126]

" 'Q. What was done in that regard, you may tell. A. I showed her the final account of myself as trustee or executor, as in my letter, I invited her to come out here, that was in 1903. I also showed her the annual account. I said I would be glad to explain the affairs of the estate to her, that I was fixing up the annual account as guardian and she was there at the time, and when I was at the courthouse I got the final account and the annual account as executor and showed them to her.

" 'Q. Where were you when you showed them to her? A. I was there in my office at the little room at the north—there is two rooms to the office.

" 'You said as you had invited her in your letter? A. Yes, sir, in my letter I had invited her.

" 'Q. What letter did you refer to, the one of August 13, 1903, that is in evidence here? A. August 13, 1903.

" 'Q. In connection with the explanation of the papers in question, did you say anything to her about it, or what did you say? A. Oh, I explained

to her about the sale of the property.

" 'Q. As you have—

" 'WITNESS (Continuing).—I explained to her about the sale of the property and the items of the account.

" 'Q. Did you tell her the facts about these matters as you have told them here? A. I related the facts to her about the sale and why I sold the property.

" 'Q. Well, did you give her information the same as you now tell the matter, or definitely? A. Well, the same information—probably I didn't go into it quite as fully, but I explained generally the nature of the transaction and why I sold it, and what I got for it, and showed her the accounts. [127]

" 'Q. Do you remember, in 1906, when the complainant came out to Montana? A. Yes, sir.

" 'Q. Did you see her at that time? A. Yes, sir.

" 'Where? A. I saw her down at the ranch of Smith Bros. Sheep Company.

" 'Q. What was she doing down there? A. She had, I think, come back from Germany if I remember correctly, and was going back.

" 'Q. Well, that states where she came from and where she was going to, but I asked you if you knew what she was doing down there on the ranch? What she was there for. A. Well, she was there, looking after her estate. I don't remember whether the final account had been put in or not, but we discussed the matter there in our presence there in the office.

" 'In the office, where do you mean? A. The office of Smith Bros. Sheep Company.

"'Q. Who discussed it? A. Well, I discussed it with her and Uncle John.

"'Who was present? A. Mr. Flatt was present.

"'Q. And you discussed what matter? A. Oh, about the sale of the property, and how it had been handled, and how we had tried to manage the property for her.'

"In the same connection a letter written by N. B. Smith to the complainant's younger sister on the 7th of April, 1905, is pertinent:

"'N. B. Smith, County Attorney, Meagher County.

"'White Sulphur Springs,

April 7th, 1805.

"'Dear Anna: Your favor of the 4th inst. came to hand. Will say presume you have my letter inclosing the $500. Yes, you will get your money in June. You need be at no expense about attorney's fees. I would like to have you come out and be here when the estate is settled. You can go over all the [128] accounts with me and see where the money has gone. I have taken receipts for everything and have paid out all money by checks. I want you to know everything and then I will feel that I have done my duty. . .

"'Your cousin,

"'N. B. SMITH.'"

John M. Smith, as guardian, settled his final account with the plaintiff on the same basis employed in settlement with Nellie Mae Moore, to wit, three per cent interest on the principal sum held by him from December 11, 1900. The net amount received by the plaintiff was $23,954.01. The initial amount

accounted for was one-third of $82,170.20, or $27,-290.06. The complaint charges that the sale was "illegal, fraudulent and collusive," and that "Napoleon B. Smith and John M. Smith colluded and confederated to secure the said property to the said John M. Smith, and to sell the same to him at much less than its real value." The claim that the property was sold at less than its then present value was virtually abandoned by the appellant in this court, and, indeed, such a contention cannot be justified in the evidence. The United States Circuit Court of Appeals decided that "the sale of the stock of the estate of the deceased Wm. A. Smith and the subsequent misappropriation of the money of the minors by their guardian were parts and parcels of a scheme entered into by and between N. B. Smith and John M. Smith, which was a fraud upon the minors and the probate (district) court." Judge Hunt, who tried the Moore case in the federal district court, and Judge Stewart, who heard this case in the Meagher County District Court, were of opposite opinion; that is to say, in their judgment there was no fraud, collusion or conspiracy, and the sale was in all respects legal, regular and free from fraud. [129]

The additional testimony given by plaintiff in the State court was, in part, as follows: "I became twenty-one in 1906; had attended school in Missoula, at Shattuck Military School and at Notre Dame; had had no business experience; the settlement between myself and my uncle was transacted by myself, N. B. Smith and Mr. Flatt; Mr. Flatt gave me

a check at the ranch for a part of the money and I think N. B. Smith gave me part of it; I saw the expense account and what the money was supposed to have been spent for; I did not question it further than this, that I asked what certain accounts were for, and any account that I happened to pick out and see I would ask what it was. Q. Now, Mr. Smith, what, if anything, did you know at that time in relation to the circumstances and conditions under which your uncle, John M. Smith, became the apparent owner of the stock that had formerly been owned by your father in the Smith Bros. Sheep Company? A. Nothing at all, but one thing I asked my uncle John while on the ranch—I asked him why it was that our property was sold, and he said that he did not feel that he wanted us children to take a chance, so he bought the property. I knew nothing of the fact that the money that was turned over to him he used to pay off his notes at the bank; knew nothing of his purpose to have himself appointed guardian so that he might utilize the money to pay off the notes at the bank; *knew nothing of his purpose to have himself appointed guardian so that he might utilize the money to pay off the notes.* I knew nothing of the affidavit presented to the court that the purpose was to sell the stock of John M. Smith in conjunction with the stock of the estate in order that the best price might be realized for it, or that John M. Smith had gotten $13,000 in two years after father's death, while the executor of father's estate only procured about $800. Mr. N. B. Smith told Mrs. Reynolds and she told me that father's stock

[130] had been sold to my uncle." The inventory value of the stock in the Smith Bros. Sheep Company belonging to the estate of Wm. A. Smith, deceased, was $61,475.

We approach the final determination of the case with the greatest respect for the decision of the learned judges of the Circuit Court of Appeals. Nevertheless, it is our duty to decide it in conformity with the dictates of our own consciences. In so doing we first consider the situation and characters of the persons accused of having formed a conspiracy to defraud the plaintiff; for unless such conspiracy existed, the conduct of the parties subsequent to the sale becomes altogether immaterial. The principal actor in the alleged plot is John M. Smith, a man sixty-four years of age, of comparative wealth, in poor health, who, whatever motive may have actuated his later conduct, appears beyond a doubt to have been sincerely desirous of disposing of his interests in the sheep business and retiring from active participation in industrial pursuits, at the beginning of the negotiations for the sale of the corporate assets. This man, who is now accused of so unnatural a purpose to overreach and defraud his brother's orphan children, had been intimately associated with that brother for many years prior to his death. They lived in a sparsely settled community; John, at least, was illiterate; but by their personal efforts and attention to business, they had succeeded in accumulating a considerable fortune. John, on account of the exposure incident to the conduct and management of a large sheep ranch, had contracted

a disease which necessitated his spending the winters in California. He died pending this litigation. It is not unnatural to assume from a contemplation of his life and its environments that he was provincial in his habits and ideas; that the spirit of thrift and a desire to save characterized his conduct and dictated his actions [131] generally. This is constantly to be borne in mind in passing judgment upon the facts in the case and the successive steps taken looking to a disposition of the property of the parties. It is not unreasonable to assume, from their relationship and association, that some considerable degree of affection existed between the brothers. John was present at the death of William, and the latter's last words were a request that John would look after the interests of his children. The promise was given and John testified that it had been faithfully kept. It is impossible to read the correspondence of this uneducated man with his nephew N. B. Smith, and thereafter entertain a doubt that, in the beginning at least, he entertained a sincere regard for the plaintiff and his sisters, was actuated by the highest motives of solicitude for their welfare and a desire to protect and conserve their inheritance. Although he held a controlling interest in the stock of the corporation, he was reluctant to sell his portion alone, for fear the minority interests of the children would suffer if strangers acquired his stock, and in giving an option to McNaught he stipulated that it should be subject to the approval of the executor of his brother's estate. It must not be forgotten, either, that the corporation was a sort of family

affair; and the record tends to show that no particular surprise was caused by the fact that John M. Smith was in the habit of drawing from its funds such moneys as he had occasion to require. The books of the concern were kept in a very informal and careless manner. In all probability the brothers had that trust and confidence in each other which was engendered and justified among those whose sturdy characters and integrity of purpose alone made it possible for the early settlers to go into the remote regions of the State and by hard labor and mutual dependence build homes for themselves and develop the natural resources of the country. [132]

The other alleged conspirator is Napoleon B. Smith, now and for many years a member of the bar of this court in good standing; a man of family, whose character for truth, honesty and integrity generally is unimpeachable, so far as the record discloses.

The property in controversy consisted of stock in the Smith Bros. Sheep Company, of the appraised value of $61,475, which Judge Armstrong, presiding in the District Court of Meagher County at the time, authorized the executor to sell for $75,000 at private sale, and which actually sold for $85,000. Several *bona fide* efforts had been made to effect a sale of the whole plant, without success. Touching the value of the stock held by the executor, he testified that he figured $75,000 was what it was worth; that he had counseled with Mr. Anderson, Dr. Parberry, Perry Moore and Len Lewis, representative sheep men of the county, and they advised him to sell if

he could get a fair price, which, in their judgment, would be $150,000 to $160,000 for the whole property.

Regarding the method pursued in the probate proceedings growing out of the administration and guardianship matters shown by the records, it is well to note that White Sulphur Springs, the county seat of Meagher County, was at that time a village of about 450 inhabitants, situated many miles from a railroad; court was held four times a year, and it is well known to the profession that probate matters were sometimes loosely conducted in those remote country districts, and the people generally regarded the district judge as a repository for all their troubles growing out of the administration of estates, and did not hesitate to seek his counsel and advice wherever they could encounter him and in the most informal manner.

Coming now to the correspondence which is claimed to disclose the conspiracy: As was well said by Judge Ross, who prepared [133] the opinion of the Circuit Court of Appeals: "A sale by John M. Smith of his majority of the stock to a stranger might have worked to the injury of the minority interest of the children of the deceased William A. Smith, so that both John M. Smith and the executor became desirous that both interests should be sold together." The executor, therefore, indorsed upon the option to McNaught an agreement to immediately make application to the District Court to sell the interest of the estate in the property at the rate therein named, in case a buyer could be

found. At that time, however, as is also noted in the opinion of the court of appeals, the evidence shows that the executor regarded the estimate of John M. Smith as to the value of the property as too high, as did others. Under date of December 14, 1897, John M. Smith informed the executor, by letter (we shall not attempt to reproduce his spelling), that he wanted to sell out "so as to go some place that I can be with my family and can send Stanley (his son) to school, as long as I hold it I can't be satisfied away from it and I don't want to sell out and leave the children's interest in it I think the coming year will be the time to let go of the entire plant you can at the next term get a permit to sell Wills interest at any time that we can get a fair value for it." He also declared that if he were young he would not care to sell. The executor thereupon, on January 24, 1898, obtained from the District Court an order to sell the property for $75,000, which was $13,525 more than its appraised valuation. There is no indication in this transaction that the executor had any notion of selling the property for less than it was worth, or, indeed, that he intended to sell it to Mr. John Smith. On March 19, 1898, John M. Smith asked the executor to name the least price he would accept for the children's stock, saying he [134] understood the latter had authority to sell for $75,000, but that he thought they could do better than that and get them $80,000 or $85,000 clear. Bearing in mind that John M. Smith held his stock at a higher valuation than did the executor that of the children, it is not unreasonable to conclude that

he acted in good faith in naming a minimum price, so that the former might have a "margin to work on." On March 25, 1898, the executor expressed a reluctance to "see a sale go by," and indicated a willingness to take $85,000 for the interest of the estate. He said: "I want to do what is fair by the estate and also by you. I want to see a sale go through in some shape, but at the same time I want to do the best I can for the estate." It does not seem possible that these men would take the trouble to express such sentiments in private correspondence if they were engaged in a conspiracy to defraud their minor relatives. On July 2, 1898, John M. Smith very frankly told the executor that their judgment differed as to the value of the property, and that he would not be satisfied with the same amount received by the estate. He then attempted to induce the executor to take less than $85,000. In our opinion these negotiations disclose no concert of action or meeting of minds between these two men. On December 30, 1898, Henry Neill made a cash offer of $80,000 for the stock of the estate. On the next day the executor informed his uncle, by letter, of this offer. In the course of the letter he said: "I am very anxious to do something with the property, as I feel that the estate is going to lose money by holding it. If you will make me a cash offer of $85,000 you can have the property. I told Neill I would not make such an offer. McNaught writes me that you owe the company $13,839.35. If you do not take the stock it would be your duty to put your note into the company for the amount. Under our law the

only way money can be drawn out of [135] a company by a stockholder is by declaring so much dividend on each share of stock. I do not make the suggestion to hurt your feelings, but you know yourself that such large transaction should not be carried on in such a loose way." It is suggested by the appellant that the expression, "I told Neill I would not make such an offer," discloses some secret understanding between the nephew and uncle at this time. We do not know exactly what was intended by N. B. Smith, but it is fair to presume that if he got his price,—what he thought the property of the estate was actually worth,—he would naturally prefer a relative to a stranger as a purchaser, provided the former wanted to buy. Or it may be said that the only meaning of the words was that the executor told Neill he would not give him an option on the estate's holdings. If Neill had offered more than $85,000 it might be contended that the executor was willing to sell to his uncle at a lesser price, but there is not any testimony to justify such a conclusion. It will be observed, also, that in the letter the executor respectfully, but firmly, called upon his uncle to pay his indebtedness to the company, which is altogether at variance with the idea that they were conspiring to defraud the children. Note, also, that at this time John M. Smith was endeavoring to obtain an option so that he might dispose of the whole property to some third person, and also that the price of $85,000 had been fixed many months prior to the offer of Neill.

What relation did John M. Smith and Napoleon B.

Smith bear to the Union Bank & Trust Company and Mr. Ramsey, its President, at this time? Substantially none, so far as the record shows, save that John M. Smith was very friendly with Henry Klein the Vice-president of the bank. The first account opened with the bank was on April 11, 1898, by the Smith Bros. Sheep Company [136] depositing $2,000. John M. Smith's account was opened April 27, 1899, by a deposit of $75,000. Yet on January 14, 1899, we find John M. Smith openly and frankly informing Mr. Ramsey in a letter that he was about to buy the estate's interest in the stock of the sheep company and asking if the bank would loan $90,000 on the entire stock. This letter also indicated that at that time he had a mind to sell the entire property at the first opportunity and thought he could make a sale in four or five months. On January 16, 1898, John M. Smith wrote to the executor saying that he had wired an acceptance of his offer to take $85,000 for the stock belonging to the estate, stating also, "If Miles makes a raise I will pay you the $90,000 that you ask you of course would put it in government bonds if you had it now to make things safe and you be absolutely safe I will give you all of the sheep company stock to hold as security and I will pay the same interest that you would get on government bonds and pay you 3 times per year until I can sell out to advantage then you will be safe and if any one is loser it will be me and I am willing to take the chances there never will be a time but what the whole business will be the best of security for that amount but I don't intend to hold it very

long at any time that I can make a good sale I will pay off your $85,000. I think this the best way for us to close up business you can get up the papers so you are safe and at the same time give me a chance to handle myself to advantage if Miles fails if you did have to pay taxes I will agree to pay it for you so it will leave it just the same as government bonds I could borrow the money of the bank at Helena by giving the same security but I would sooner deal with you and you are just as safe as though you had government bonds." To this letter N. B. Smith replied on January 16: "I want a clear understanding [137] with you so that there may be no hereafter in the matter. It is understood that I am to get $85,000 for the stock and the estate is to have that and not owe the company anything. You had better pay a portion down." On January 22 John M. Smith inquired, by letter, how much the executor wanted him to pay down and what interest he would want on the balance. He also said that in his judgment it would not take longer than May the first to make "some turn so I will get the balance for you." On January 21 John M. Smith was informed by Mr. Ramsey that he could borrow $90,000 at 9% interest. On January 24 the executor wrote to his uncle in part as follows: "I cannot sell the way you indicated. The only way I can sell is for cash down. If you are appointed guardian of the children then I could turn the money over to you. As I told you all the time I have no right to sell on credit." But on January 20 the executor wrote the so-called "lost letter," which is thought by the appellant to have mapped

out a fraudulent scheme to defraud him and his sisters. It really makes very little difference who first proposed the plan. There does not appear to have been anything secret about it. John M. Smith sent the "lost" letter to Ramsey, who read and returned it. On January 27th John M. Smith wrote to the executor: "I think your plan good. I will take steps to get the ten thousand down payment and we will proceed to business at once. I will write to the bank and arrange for the money if you have me appointed guardian for the children as soon as I sell out I want to invest in government bonds all their money and also my own as I don't intend to try to do any business after I sell out and I fully intend to let go this spring I think your suggestion a good one. I think I should have the children come out here the schools is first class and the climate is good also good society." [138]

It would serve no useful purpose to again quote any substantial portion of the correspondence. It is very clear to us (1) that neither John M. Smith nor Napoleon B. Smith ever had any intention or design to defraud the children or to gain any advantage over them. Indeed, in our opinion, all of their correspondence and actions indicate a most praiseworthy solicitude for their material welfare. (2) The property was sold for its full market value and the children suffered no detriment whatsoever on account of the sale. We believe that both John M. Smith and Napoleon B. Smith acted with the utmost good faith in the premises, that they exercised sound judgment as to the affairs of the children, and

constantly had in mind the fact that they were dealing with a trust estate and ought not to jeopardize it by taking any chances of its being diminished or lost while in their care. With this in mind it naturally occurred to them that an investment in government bonds was perhaps the safest that could be made. At least they appear to have had such an ultimate investment constantly in mind. (3) We think it equally clear that neither of these parties at any time pending negotiations for the sale, or at the time of the sale, had any idea that John M. Smith should buy the property as a speculation or as a permanent investment. We cannot read their correspondence or contemplate their actions and hold the opinion that either of them ever entertained any other notion than that John M. Smith, after becoming sole owner, should dispose of the entire plant at the earliest opportunity, and, if possible, within a very few months after the sale. We think the correspondence shows, also, that they were dealing with each other at arm's-length, and we find no evidence that N. B. Smith was dominated by his uncle or influenced by him to do any act inimical to the interests of the children. It is very easy to select a fragment of one letter here, and another there, [139] and by patching them together draw a partisan conclusion, altogether variant from the intentions and sentiments of the writers. We do not think that any of the main deductions of fact drawn by the appellant are justified in the evidence. We are also of opinion that John M. Smith's frank and repeated assertion that in his judgment the property was of greater

value than that at which the executor estimated it, in itself shows good faith on his part. (4) Neither have we any doubt that John M. Smith was honestly of the opinion that, considering the large undertaking he would be required to give, and which he eventually did give, for the faithful performance of his duties as guardian, together with his individual responsibility, and the further fact that the entire property would be speedily disposed of and the proceeds invested in government bonds, it was a perfectly legitimate transaction to employ the guardian ship funds temporarily to take up the indebtedness to the Union Bank & Trust Company and thus avoid the payment of so large a rate of interest as nine per cent per annum on the sum of over $80,000. He testified that he thought he had a right to turn in the certificates in payment of his notes because he had given security; that he understood he was using money that was turned over to him as guardian, but thought he had a right to do so, as he had given security; because "it was the same as though it was in my possession." He very frankly stated that he might have made a mistake, but that he did not do so with intent to defraud anyone, and if he had wronged anybody he was willing to make it right. He said he thought it was just the same as if he put it in Government bonds if he paid the interest. We cannot believe that this old man was engaged in a fraudulent conspiracy to defraud his brother's [140] orphan children. Moreover, the facts show that they have not been defrauded. Their property was sold to the only purchaser who could be found

who was willing to give as much as $85,000, the full value thereof; and that sum, after deducting expenses of administration, had been fully paid to them. It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest and for a longer period of time, than was actually required of him, but that question is not before us; and even if it should be answered in the affirmative, the fact cannot by relation characterize as fraudulent and void prior transactions which were in themselves honest and free from actual fraud.

But it is contended that the plan adopted by John M. Smith of using the guardianship funds to take up his personal indebtedness to the bank was fraudulent and void as a matter of law. In this connection it may be well to note that aside from the question of the rate of interest that should have been exacted from John M. Smith as guardian, the equities of the case are all with the respondents. The appellant is attempting, in a court of equity, to overturn and set aside a purchase of property sold in good faith, for its full value, every dollar of which has been accounted for, because, as he claims, his guardian used his money for a short time, in order to effect the purchase. In fact, this consideration is of no moment whatsoever, so far as the result to the appellant is concerned. Not any of his property was embezzled or withheld. All of it was duly and regularly accounted for when he became of age, and turned over to him. During the latter years of his minority he took no chances of the sheep industry

being affected by adverse legislation; he was fully protected from loss; if John M. Smith had continued to pay interest on the amount temporarily borrowed from the bank and had allowed the guardianship funds [141] to lie idle, or if he had sold out the entire holdings of the sheep company, as contemplated, the result to the appellant would have been exactly the same as that brought about by the course of procedure actually adopted. If the appellant had been defrauded in fact, or if he had lost anything by reason of the methods pursued by his guardian, he would be in an altogether different situation; but such is not the case.

It is claimed by the learned counsel for the appellant that in the circumstances disclosed by the record, John M. Smith was (2) guilty of larceny under the provisions of section 8656, Revised Codes, which are as follows: "Every person acting as . . . guardian . . . who secretes, withholds or otherwise appropriates to his own use . . . any money . . . in his possession or custody, by virtue of his office, employment or appointment, is guilty of larceny." This section has no bearing upon the case disclosed by the record. Smith did not secrete or withhold the money of his wards. They were in nowise aggrieved by his method of procedure. Even if we assume that he was not justified in using the funds as he did, and that he thereby technically appropriated them to his own use, yet we must look to the ultimate result of his actions in order to correctly judge of the effect thereof upon the instant controversy. It is impossible for us to

believe that a guardian who had given ample security to account for all funds coming into his hands, who was personally able to raise the amount thereof on demand, who sincerely believed that he was acting legally and for the best interests of his wards, and who did, in fact, fully account for all moneys paid over to him, should or could be adjudged guilty of a heinous crime in a subsequent suit by one who has not lost or suffered by his conduct.

The particular infirmity in the case of the plaintiff is that he is attempting to avoid the sale for a purely technical [142] reason; a reason based in facts arising after the sale was complete, and which had no effect whatsoever upon the sale itself. It is claimed that this may be done because the whole course of action was fraudulent and therefore void; that the subsequent use of his money, pursuant to a prior design to so employ it, vitiated the sale theretofore made. But his premises are defective. Not any fraud in fact was contemplated or practiced in any part of the proceedings; at most a mistake was made by the guardian as to his right to so use the money; and a technical violation of duty on his part may not now be employed to overturn a transaction otherwise regular and legal, by which no one had suffered any injury.

Two very elaborate and able briefs have been submitted by counsel for the appellant. Numerous decided cases are therein cited, all of which we have examined with painstaking care, but not any of which, in our judgment, deal with the exact question here involved. It is contended that equity must

frown upon such a proceeding as that disclosed by this record, because it has a tendency to "despoil the weak wards of chancery, even though in the individual case it may have been entered upon with the most praiseworthy motives and a fair and even liberal consideration for the property was paid." But we conceive that a court of equity, while constantly bearing in mind the beneficent fundamental principles of its jurisprudence, should carefully and conscientiously examine and decide each case upon the particular facts therein disclosed, with a view to doing substantial justice by the immediate litigants, lest in applying a hard-and-fast rule to all cases alike, injustice may be done to the parties then claiming the attention of the Court. We find no occasion to unduly lengthen this opinion by a review of the cases cited. [143]

In addition to the basic question heretofore considered, several technical points of law are advanced in behalf of the appellant and elaborately argued. Some of them are incidentally disposed of by what has already been said; the others have no merit, in our judgment. The facts of the case are against the appellant.

The judgment and order are affirmed.

Affirmed.

Mr. Chief Justice Brantly and Mr. Justice Holloway concur.

[Excerpt from Appellant's Brief in Supreme Court, Montana, in Smith vs. Smith, etc.]

That in their brief, submitted to the Court on behalf of defendant in this cause counsel for defendant

referred to and submitted to the Court, the following from Appellant's Brief on Appeal, in said cause of Smith vs. Smith. From page 43 the following:

> "As shown heretofore, he got back as John M.'s attorney in the guardianship proceedings at the first opportunity, got for him the order permitting him to borrow the money of the estate at three per cent though he must have known, as a lawyer, that the order had not the semblance of validity about it effective to condone his previous misappropriations, and as attorney for John M. he prepared the account of the latter as guardian in which he was exonerated altogether from the payment of interest on the guardianship funds down to December 11, 1900, when the famous 'order' was obtained, and was charged only three per cent thereafter."

From page 74, the following:

> "It is elemental that a trustee cannot loan the trust funds to himself with or without security.
>
> 1 Perry on Trusts, 453, 461.
>
> In re Petrie, 5 Dem. Sur. 352.
>
> In re Jones, 10 N. Y. St. 176."

From page 106 the following:

> "Nor that the order permitting John M. to borrow the funds of the estate would not operate retroactively, even if it had any validity at all, to legalize his former misappropriations. [144]
>
> Hendlee vs. Cleaveland, 55 Vt. 142.

Nor that no attention can be paid to any testi-

mony about any private talks with the judge about the matter."

Also appellant's assignment of error No. 14, page 60, in their brief, which is as follows:

"It was error in the Court not to hold and find, and to decree accordingly, that under any circumstances the defendant John M. Smith and his successor in interest should account to the appellant for the full value of the use of the money of the appellant, at the current rates of interest charged by banks during the time that he had the use of such money."

[Excerpt from Appellant's Petition for Rehearing in Smith vs. Smith, etc., in Supreme Court, Montana.]

From appellant's petition for Rehearing in said cause, p. 23, the following:

"Without further elaboration, the Court will see that it must denounce as wholly idle any effort to give countenance to the use by a guardian of his ward's funds, by the procurement of any order authorizing him to borrow them, whether it be made before or after he has actually used the funds.

The statute is to be construed in view of the universal rule that the guardian cannot 'borrow' his ward's funds and that if he makes use of them upon any pretence of a loan, it is a conversion of the trust estate."

Also the following from pages 32 to 33:

"It is insisted that equity and justice demanded that he pay just what he would have

been obliged to pay any one else,—namely, nine per cent.

Unquestionably either that rate or the legal rate should be made the basis of computation unless the order fixing the rate at three per cent. is valid. That it is not, is indubitable upon the authorities referred to."

"Dismissing, then, the order, the prevailing rate of interest, certainly nothing less than the legal rate, must be exacted. And the rule is universal that when the trustee uses the trust funds annual rests must be made in the accounting with him."

[Excerpt from Respondent's Brief in Smith vs. Smith, etc., in Supreme Court, Montana.]

Counsel for defendant cited and submitted to the Court the following from pages 106 and 107, of Respondent's Brief on Appeal in said case of Smith vs. Smith:

"It is not denied that the Court or Judge had the power to authorize the investment or borrowing of the moneys."

Section 3015, Code of Civil Procedure, provides:

[145]

"The Court, on the application of a guardian, . . . may authorize and require the guardian to invest the proceeds of sale, or any other of his ward's moneys, in his hands, in real estate or in any other manner most to the interest of all concerned therein; and the court or judge may make such other orders and give such directions as are needful for the management, invest-

ment and disposition of the estate and effects, as circumstances require."

"Sections 2957 and 2982 clearly contemplate the earning of interest on funds. And had there been a formal court order made on June 14, 1899, when John M. received the moneys as guardian, authorizing him to borrow them, instead of an informal talk with the Judge about that time, the proceeding would have been regular and in all respects in accordance with statute, and it could not have been said that the money was even wrongfully, much less criminally or fraudulently used."

Defendant's Exhibit "A" [Decree of Settling of Final Account of Guardian and Distribution to Ward of His Share of the Estate, in the Matter of the Estate and Guardianship of William Smith, Minor, in District Court, County of Meagher, Montana].

DEFENDANT'S EXHIBIT "A," PUT IN EVIDENCE BY DEFENDANT.

In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate and Guardianship of WILLIAM SMITH, Minor.

DECREE OF SETTLEMENT OF FINAL ACCOUNT OF GUARDIAN, AND DISTRIBUTION TO WARD OF HIS SHARE OF ESTATE.

John M. Smith, the guardian of William Smith,

minor, having on the 1st day of December, A. D. 1906, rendered and presented for settlement and filed in this court his final account of his guardianship of the estate of said ward, and said guardian having also filed in this court a petition, setting forth among other matters that said ward, William Smith, was of age in the month of October, A. D. 1906, and was twenty-one years of age, and that his guardianship of said ward should be terminated, and that the shares of said ward in certain real and personal property should be distributed to said ward, and said matter coming on regularly to be heard, on this 14th day of December, A. D. 1906.

Upon satisfactory proof of the due posting of notice of said hearing for ten days before said 14th day of December, A. D. 1906, as directed by this Court, the said guardian appearing by his counsel, N. B. Smith, Esq., the Court proceeded to the hearing of said petition; and it duly appearing to the Court, after having fully examined said account and the vouchers produced in support thereof, that said account contains a just and full account of all moneys received and disbursed by said guardian from the commencement of his guardianship to the 30th day of November, A. D. 1906, both dates inclusive; that all necessary and proper vouchers were [147] filed and produced herein; that the total amount received by said guardian as such is $32,918.57, and the full amount expended $8,954.56, leaving a balance of $23,954.01, and that said account is entitled to be allowed and approved; and it appearing to the satisfaction of the Court that the shares of said ward in

certain real and personal property should be distributed to said ward; and it duly appearing to said Court that since the rendition of said final account no moneys have been received or distributed or disbursed by said guardian on account of said ward, William Smith; that said ward, William Smith, is entitled to receive from said John M. Smith, his guardian, the sum of $23,954.01, being the balance remaining in his hands as such guardian on settlement of said final account; and all and singular the law and the premises being by the Court seen, heard, understood and fully considered, whereupon,

It is here Adjudged and Decreed, that all the acts and proceedings of said John M. Smith, guardian as aforesaid, as appearing upon the records hereof, be and the same are, hereby approved and confirmed, and the said guardian is hereby directed to pay over to his said ward, William Smith, the said sum of $23,954.01, being the balance remaining in his hands after the settlement of his final account, taking the receipt of said ward therefor.

It is further Ordered, Adjudged and Decreed, that of the real and personal property of said ward William Smith, exclusive of the money aforesaid, there be distributed to said ward, William Smith, the property affected by this decree, as follows, viz.:

5 5/6 Shares of the Capital Stock of the First National Bank, of White Sulphur Springs, Montana.

62,500 Shares of the Capital Stock of the Black Hawk Mining Company.

63,500 Shares of the Capital Stock of the Alice Mining Company.

An undivided one-sixth interest in eight town lots in Higgins [148] Townsite of the Town of White Sulphur Springs, Montana, being Lots 20 and 21 in Block 22; and Lots 1, 2 and 3 in Block 30; and Lots 13, 14 and 15 in Block 11.

An undivided one-sixth interest in two town lots, in Park Addition to the City of Livingston, Montana, being Lots 8 and 25 in Block 22, according to the plat filed in the office of the Recorder of Deeds in Gallatin County, Montana.

Done in open Court this 14th day of December, 1906.

E. K. CHEADLE,
Judge of the District Court.

[Endorsed]: Certified Copy No. 255. In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher. In the Matter of the Estate and Guardianship of William Smith, Minor. Decree of Settlement of Final Account, and Distribution to Ward of His Share of Estate. N. B. Smith, Attorney for John M. Smith, Guardian. Filed this 14th day of December, A. D. 1906. A. C. Grande, Clerk. Recorded in Book 18 of Orders and Decrees, pages 362–3–4. [149]

~~No. 5. Wm. Smith vs. Mary M. Smith, Executrix. Deft's. Ex. "A." Filed Jan. 16, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.~~

State of Montana,
County of Meagher,—ss.

I, F. H. Mayne, Clerk of the District Court of the Fourteenth Judicial District of the State of Montana,

in and for the County of Meagher, do hereby certify that the foregoing is a full, true and correct copy of the original "Decree of Settlement of Final Account, and Distribution to Ward of His Share of Estate," in the matter of the estate and guardianship of William Smith, minor, with the endorsements thereon, remaining on file in this office.

Witness my hand and the seal of said court this 31st day of July, 1913.

[Seal] F. H. MAYN,
Clerk.

No. 5. Wm. Smith vs. Mary M. Smith, Executrix. Defts. Ex. "A." Filed Jan. 16, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. **[150]**

Defendant's Exhibit "B" [Decree of Final Discharge, in the Matter of the Estate and Guardianship of William Smith, Minor, in District Court, County of Meagher, Montana].

DEFENDANT'S EXHIBIT "B," PUT IN EVIDENCE BY DEFENDANT.

In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

In the Matter of the Estate and Guardianship of
WILLIAM SMITH,
Minor.

It appearing that said estate and guardianship has been fully administered, and it being shown by the guardian thereof, by the production of satisfactory vouchers, that said guardian has paid all sums of

money due from him, and delivered up under the order of the Court all the property of the estate of the party entitled and performed all acts lawfully required of him.

It is ordered, adjudged and decreed that said guardian, John M. Smith, and his sureties be and they are hereby released and discharged from all liability to be hereafter incurred; that said estate is fully distributed, and the trust settled and closed.

Dated this 27th day of December, 1906.

E. K. CHEADLE,
Judge of the District Court.

State of Montana,
County of Meagher,—ss.

I, F. H. Mayn, Clerk of the District Court of the Fourteenth Judicial District, State of Montana, in and for the County of Meagher, do hereby certify that the foregoing is a full, true and correct copy of the original "Decree of Final Discharge" in the Matter of the Estate and Guardianship of William Smith, Minor, with the endorsements thereon, remaining on file in this office. **[151]**

Witness my hand and the seal of said Court, this 31st day of July, 1913.

[Seal] F. H. MAYN,
Clerk.

[Endorsed]: No. 255. District Court, Tenth Judicial District, Meagher County, Montana. In the Matter of the Estate and Guardianship of William Smith, Minor. Decree of Final Discharge. Filed this 27th day of December, 1906. A. C. Grande, Clerk. N. B. Smith, Attorney for John M. Smith,

Guardian. Recorded in Orders and Decrees 18, page 368. No. 5. Wm. Smith vs. Mary M. Smith. **[152]** Deft's Ex. "B." Filed Jan. 16, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. **[153]**

(Title of Court and Cause.)

STIPULATION.

It is hereby stipulated and agreed by and between the counsel for the parties above named that on the trial of said cause plaintiff offered in evidence the following portions of the printed record on appeal to the Supreme Court of the State of Montana, in the case of William Smith, Plaintiff, vs. Mary M. Smith, as Executrix et al., Defendants:

Testimony of John M. Smith from line 18, page 516 to line 17, on page 518; also statements of John M. Smith found on page 570, beginning with line 24 down to and including pages 571, 572, 573 and 574.

Testimony of N. B. Smith beginning at line 28 on page 795, down to line 10, page 798; also from line 30, page 799, down to line 26 on page 802; also the judgment-roll and the decision of the Circuit Court of Appeals for the Ninth Circuit, in the case of Nellie Mae Moore vs. John M. Smith et al., defendants.

Also pages 126–127, and 128, of appellant's brief in chief in the case of William J. Smith vs. Mary M. Smith in the State Supreme Court; also part of respondent's brief in the same matter, beginning with the paragraph entitled: "Accounting for **[146]** Interest," in page 196 and continuing on page 197 thereof; also part of brief on petition for rehearing, beginning third line from the bottom of page 31 to page 38, inclusive; also that part of the brief of re-

spondent in reply to the petition for rehearing which dealt with the matter of interest.

Certified copy of abstract from Probate Register for the year 1900, of the District Court of Meagher County, Montana.

And that in this cause in their reply brief, counsel for plaintiff referred to the statement of John M. Smith from line 6, page 539 to line 20, page 540, of the Record on Appeal in the state court of William J. Smith vs. Mary M. Smith et al.

That on the trial of the above-entitled cause, counsel for defendant offered in evidence the judgment-roll contained in the printed record on appeal in said case of Smith vs. Smith; also the opinion of the Supreme Court of the State of Montana, rendered in said cause and reported in 45 Montana Reports, pages 535–582, inclusive; also evidence of William J. Smith, pages 1340 to 1357, of record in case of Smith vs. Smith.

That in their brief, submitted to the Court on behalf of defendant, in this cause, counsel for defendant referred to, cited and submitted to the Court, pages 24, 25, 43, 71–75, 105–6, 113, 124–128, of appellant's brief on appeal in said cause of Smith vs. Smith; and to appellant's assignment of error, number 14, page 60, of said brief of appellant.

To pages 2, 5, 6, 7, 8, 14, 16, 17, 19, 20–24, 25, 27, 31, 32 and 38 of appellant's petition for a rehearing in said cause.

Also pages 106–7 and pages 196 and 197, of respondent's brief on appeal in said cause.

It is hereby stipulated and agreed that the Court

in deciding this cause, had before it, and that the evidence above referred to, together with those portions of the briefs **[154]** designated herein may be incorporated in and form a part of the statement of the case and record on appeal in this cause, as well as any other evidence admitted by the Court upon the trial.

C. B. NOLAN,
WM. SCALLON,
Counsel for Plaintiff.
R. LEE WORD,
H. G. & S. H. McINTIRE,
Counsel for Defendant.

Filed March 28th, 1914.

The foregoing statement, being true, complete and properly prepared, is hereby approved this 22 day of April, 1914.

GEO. M. BOURQUIN,
Judge.

[Endorsed]: Title of Court and Cause. Statement of Evidence to be Included in Record on Appeal. Filed April 22, 1914. Geo. W. Sproule, Clerk. **[155]**

That on the 7th day of February, 1914, the Opinion of the Court was duly rendered and filed herein, being in the words and figures following, to wit: **[156]**

[Opinion.]

In the District Court of the United States, in and for the District of Montana.

No. 5.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

This is a suit by a former ward against the executrix of the will of his deceased guardian. The bill alleges that in his lifetime the guardian in possession of the ward's money appropriated and converted the same; that eighteen months thereafter the guardian applied to the Court of his appointment in this State for an order authorizing him to borrow said money at interest at the rate of 3% per annum, therein concealing from said Court his said appropriation thereof and misrepresenting that it was in his possession, which order was made; that thereafter the guardian presented accounts, including his final account, to said Court wherein he did not disclose his appropriation of said money, did not present any excuse for failure to invest it for the ward's benefit, and did not charge himself with any interest thereon prior to said order, and thereby fraudulently and by imposition procured the Court to settle the same; that when the ward attained majority the guardian settled with him on the basis of the final

account, thereby depriving the ward of a large amount of interest rightfully his due. The bill pleads excuses to avoid laches, and the prayer is that all decrees of settlement of the guardian's account be set aside or held for naught, that a new account be stated, and that complainant have and recover from defendant as executrix the balance due thereon, alleged to be about $24,700.00. The answer denies appropriation and conversion of said money, denies concealment from and misrepresentation [157] to the Court, denies anything due, and pleads insufficiency of the bill in part to state a cause of action in equity, *res judicata,* limitations and laches.

The evidence is brief and without conflict. It appears therefrom that in 1899 the estate of the ward's deceased father was in administration in this State. The heirs were complainant and his two sisters. The property thereof was here located and the guardian here resided. The principal of said property was sold at executor's sale, and was purchased for $85,000.00 by the ward's uncle, who was thereafter by a court of this State appointed their guardian. He borrowed money upon his notes at interest of 9% per annum to pay for it. When he paid, the executor redelivered the money to the amount of about $82,000 to him as guardian, and with it he paid his said notes. Eighteen months later the said Court made an order wherein is recited that the guardian applied for authority to borrow "the funds in his hands belonging to said minors" at interest, rate 3% per annum, which authority was granted. Thereafter the guardian presented accounts, one of them his final account,

to said Court, reciting his receipt of the money but not his use thereof, not charging himself with interest prior to said order, and not setting out any excuse for failure prior to said order to invest the money for the ward's benefit. Decrees of settlement of said accounts were entered. The ward attained majority in October, 1906, the final account was settled December 14, 1906, the balance thereby shown due the ward, $23,954.00, was paid him on December 15, 1906, and an order discharging the guardian was made December 27, 1906. When complainant received the balance due him, he had no knowledge that the guardian had used the money prior to the order authorizing him to borrow it, and had no knowledge of the aforesaid concealments from and misrepresentations to the Court. His suspicions were first aroused by some information received [158] from his sister in or about August, 1907, and he then commenced in the aforesaid court a suit against the guardian wherein he alleged the purchase by the guardian of the property of his deceased father's estate was fraudulent, had been rescinded by complainant, and prayed for recovery of his distributive share of said property and accrued profits. The guardian died *without Montana* in October, 1908, and defendant herein was appointed executrix of his will in November, 1908, and substituted defendant in said suit. In the meantime complainant's sister brought a like suit to that aforesaid in this court, wherein the testimony of the guardian and other witnesses was taken before the guardian's death, and the suit aforesaid of this complainant in the State court was tried upon the evi-

dence submitted herein in his sister's suit. (The sister's suit may be found reported at 182 Fed. 540, 199 Fed. 689.)

Judgment went for defendant and establishing the validity of the purchase involved, complainant appealed to the Supreme Court of the State, and the judgment was affirmed.

See 45 Montana, 535.

Thereupon complainant moved for a rehearing, in part upon the ground that at least he was entitled to interest upon his money used by the guardian prior to the order authorizing the latter to borrow it, and that the suit should be remanded with leave to amend the complaint as a basis for its recovery. This was resisted by defendant and was denied by the Supreme Court, apparently on November 14, 1912.

March 14, 1913, complainant presented a claim consistent with the cause of action of the instant suit to defendant—executrix, and May 17, 1913, commenced this suit based upon said claim.

From complainant's majority until the guardian's death, the latter was within Montana but six months, and thereafter until this suit commenced, defendant was within Montana but fifteen [159] months. At all the times aforesaid the guardian, ward and defendant were citizens of Montana and defendant now is a citizen of Montana, save that complainant when this suit was commenced was a citizen of California. It would seem that the complainant is entitled to the relief prayed for. In so far as the answer depends on the ground that the bill in part is insufficient to constitute a cause of action in equity,

it is aimed at mere matter of inducement which may be ignored and the bill be yet sufficient. The facts clearly show the guardian violated his duty to the ward. He had neither legal nor moral right to use the ward's money to pay his, the guardian's debts, but having done so, it was his legal duty to disclose it in his accounts and charge himself with the profits he thereby made or legal interest at the Court's election. His failure therein was constructive if not actual fraud. In the matter of the Court's order authorizing the guardian to borrow the ward's money at less than a moiety of the legal rate of interest, there is no evidence of the circumstances of its procurement other than its own recitals. These compel the inference that the guardian not only concealed from the Court that eighteen months before he had used the ward's money, but also that he misrepresented to the Court expressly or by implication, that he then had in his possession the ward's money intact. Here again was fraud, constructive or actual, however lacking the guardian, a fiduciary, may have been of evil motive or intent.

The order so procured by fraud and imposition upon the Court was voidable and when challenged as here, affords no protection to the guardian. As though never made, the guardian is liable to the ward even as in the matter of the use of the money prior to the order. The relation of a guardian to his ward and to the Court is fiduciary. In him is reposed trust and confidence. He is a trustee and held to the strict accountability attaching to a trustee. The Court has statutory power to authorize a trustee

[160] and so a guardian, to enter into a transaction involving the trust and in which he has an interest adverse to the beneficiary, but only when the trustee discloses to the Court full knowledge of his motives and of all other facts which might affect the Court's decision.

Sec. 5376, R. S. Montana.

This disclosure was absent here. Had it been made, it is inconceivable that the order also would have been made. It is the contention of the defense, however, that the order and the decrees of settlement of the guardian's accounts and his discharge are conclusive and forbid any relief herein to complainant. It is true that decrees of a State court in probate, though in their nature *ex parte,* there being in fact no adversary proceedings, are generally conclusive, but like all other decrees, judgments, proceedings, they may be attacked and set aside, or rendered inoperative, when procured by fraud. The party thereto against whom they operate is not estopped from obtaining in a court of equity relief from them. It may be such relief could be procured in the court of their origin—by complainant in the instant suit in the State court of the decrees involved—but that is no reason why another court—this court in the instant suit by virtue of its equity jurisdiction and attaching by reason of diverse citizenship of the parties—may not and is not bound to give relief according to the recognized rules of equity.

Herein, this Court does not sit in review of the State court, nor inquire into mere irregularities and errors, nor assume to set aside the decrees involved,

but since said decrees were procured by fraud, it will deprive defendant of the benefit of them and of inequitable advantage derived under them.

See Arrowsmith vs. Gleason, 129 U. S. 86.

Marshall vs. Holmes, 141 U. S. 589.

This is equally true of the order and the guardian's discharge. [161]

The plea of *res judicata* is not well founded. The former suit had no double aspect and was based solely on rescission of a sale and to recover the specific property and accrued profits. It terminated by a judgment establishing the validity of the sale and denying the right to rescind. The instant suit is based on misappropriation by the guardian of money received from said sale and to recover interest as damages because thereof. Surely this suffices to demonstrate *res judicata* does not apply. True, the petition for rehearing in the former suit sought to secure leave to change the cause of action therein to that herein, to reverse the theory of the former suit, but it was resisted by defendant and denied by the Court. The cause of action herein was not in issue nor determined nor open to determination in the former suit.

In the matter of limitations, defendant's principal contention is that complainant's claim was not timely presented to the deceased guardian's executrix. The statute involved provides, among other things, that in the administration of estates "all claims arising upon contracts" must be presented within a limited time, that "any claim not so presented is barred forever," and that "no holder of any claim" shall maintain an action thereon unless it is first presented.

Complainant's claim was presented prior to suit, but not within a limited time. The statute distinguishes between claims arising upon contracts, that is, originating in contracts, and all other claims. Now, a claim against a guardian like that at bar does not arise upon contract. The relations between a guardian and ward are not contractual, but are fiduciary and created by law. The guardian's duty and obligation to deal justly with the ward are not of agreement, but are imposed by law. *Any his* breach thereof by fraud, as here, sounds in tort, and while the action may take the form of a suit in equity for an accounting, the gist of it is the guardian's fraudulent breach of an obligation imposed by law,—is fraud. In so far as complainant seeks interest [162] in excess of that received upon the money used by the guardian by virtue of the Court's order authorizing the guardian to borrow it, his claim does not rest upon nor arise upon the transaction in the nature of a contract so authorized by the Court. The order being voidable for the guardian's fraud, has been repudiated by complainant, and he demands his dues arising not at all from contract, but from the obligation imposed by law; viz.: that the guardian pay at least legal interest upon the ward's money used by him without lawful authority. It is defendant's contention that for a deceased trustee's breach of trust like that here involved, the beneficiary has but the right of a simple contract creditor, and so his claim is one arising upon contract within the meaning of the statutes aforesaid. The position of the beneficiary is like unto that a simple contract creditor, in

that he has no lien upon the estate and no priority. But this does not transform the claim from one *ex delicto* to one *ex contractu*, going only to its rank status in the matter of its payment from the assets of the estate. It satisfied the statute to present the claim before suit. The general statute of limitations relied upon by defendant is recognition that the gist of the suit is fraud. This statute is that the period prescribed for the commencement of an action is "within two years . . . . for relief on the ground of fraud or mistake," computed from the aggrieved party's discovery of the facts constituting the fraud or mistake. Section 6458, R. S. Montana, provides that "if when a cause of action accrues against a person he is out of the State, the action may be commenced within the term herein limited after his return to the State, and if after the cause of action accrues he departs from the State, the time of his absence is not part of the time limited for the commencement of the action." Another section provides that if a person against whom a cause of action exists dies without the State, the time which elapses between his death and the expiration of one year [163] after the issuance within the State of letters testamentary, is not a part of the time limited for the commencement of an action against his personal representative. It is defendant's contention that section 6458, *supra*, is an exception to the general statute of limitations, to be strictly construed and not to include personal representatives of debtors, since they are not within its letter. If this be sound, the instant suit is barred. But it is the statute law of

Montana that strict construction of statutes derogatory of the common law is abolished and all statutes are to be liberally construed with a view to effect their objects and to promote justice. Sec. 6214, R. S. At common law, neither absence from the realm nor death suspended the operation of limitations. This was an evil and tended to defeat justice, in that at such times there could be no service of process and no effective prosecution of a cause of action. The object of sec. 6458, *supra,* was to furnish a remedy. The evil to be remedied and the object to be accomplished thereby attach no less to the case of absence of a personal representative than to the case of absence of a debtor. Prosecution to effect and justice are hampered equally in both cases. The reason for the statute is as potent in one as in the other. And though the literal reading of sec. 6458, *supra,* may support defendant's contention, it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the State of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action. And so are the cases,

Hayden vs. Pierce (N. Y.), 39 N. E. 638.
Smith vs. Arnold, 1 Lea (Tenn.), 378.
Wilkinson vs. Winne, 15 Minn. 159.
And see French vs. Davis, 38 Miss. 218.
Cotton vs. Jones, 37 Tex. 34.

Under all the circumstances of this case, complainant has not been guilty of laches. As soon as his suspicions were aroused, he commenced the action in the State court. Although [164] he mistook his right

and remedy, it was not culpable negligence, as is evidenced by the fact that though he failed, his case was tried upon the evidence taken in his sister's suit in this court, and which herein succeeded. When he failed, with reasonable promptness he commenced the case at bar. It is to recover for breach of trust obligations. The guardian is dead, but otherwise there appears no change of conditions, no loss of evidence.

The Court is of the opinion that complainant is entitled to recover in the amount prayed for, viz.: $17,015.23 and legal interest from June 14, 1908, to date, and costs.

Decree accordingly.

Feb. 7, 1914.

BOURQUIN, J.

Filed Feb. 7, 1914. Geo. W. Sproule, Clerk.

[165]

And thereafter, on February 10, 1914, a Final Decree was duly rendered and entered herein, in the words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

Decree.

This cause came on to be heard at this term, and

was argued by counsel; and thereupon, upon consideration thereof,

It is on this 10th day of February, 1914, Ordered, Adjudged and Decreed that complainant have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, the sum of seventeen thousand fifteen dollars and 23/100 dollars ($17,015.23), with interest at eight per cent per annum from June 14, 1908, making a total of twenty-four thousand seven hundred twenty-one and 24/100 dollars ($24,721.24).

It is further ordered, adjudged and decreed that complainant have and recover from the estate of John M. Smith, deceased, and from Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, his costs herein expended amounting to ninety-eight and 05/100 Dollars.

It is further ordered, adjudged and decreed that the amounts herein found due the complainant shall bear interest at the rate [166] of eight per cent per annum from this 10th day of February, 1914.

And it is further ordered, adjudged and decreed that said estate of John M. Smith, deceased, and said Mary M. Smith, as executrix of the estate of John M. Smith, deceased, defendant, pay in the due course of administration the amounts hereinbefore specified and found to be due the complainant.

GEO. M. BOURQUIN,
Judge.

[Indorsed]: Title of Court and Cause. Decree. Filed and entered February 10, 1914. Geo. W. Sproule, Clerk. [167]

Thereafter, on June 29, 1914, petition for appeal was duly filed and allowed herein, being in the words and figures following, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

Petition for Appeal.

To the Honorable the Judges of the District Court of the United States, Ninth Circuit, District of Montana:

The above-named defendant, feeling herself aggrieved by the decree made and entered in this cause on the 10th day of February, 1914, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons and upon the grounds specified in the assignment of errors, which is filed herewith, and she prays that her appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at

San Francisco, California, and your petitioner further prays that the proper order touching the security to be required of her to perfect her said appeal be made, and your petitioner will ever pray, etc.

H. G. & S. H. McINTIRE,
R. LEE WORD,
Solicitors for Defendant.

The aforesaid petition is granted and the appeal is allowed.

GEO. M. BOURQUIN,
Judge of the District Court of the United States for the District of Montana, Ninth Circuit.

Filed June 29, 1914. Geo. W. Sproule, Clerk.
[168]

Thereafter, on June 29, 1914, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

IN EQUITY.

WILLIAM SMITH,
Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,
Defendant.

Assignment of Errors.

Comes now the above-named defendant, on this

29th day of June, 1914, and says that the decree entered in the above cause on the 10th day of February, 1914, is erroneous and unjust to the defendant, and assigns and specifies the following errors committed by the Court in the rendition and entry thereof:

1. The Court erred in holding and deciding adversely to the defendant herein that the claim of complainant upon which this action is based was not one that had to be presented to the defendant herein as executrix of the estate of John M. Smith, deceased, for allowance or disallowance, during the period of publication of notice to creditors of said estate as required by sections 7522, 7525 and 7532 of the Revised Statutes of Montana of 1907, relating to the settlement of claims against estates of deceased persons.

2. The Court erred in holding and deciding that the statutes of the State of Montana relating to the presentation of claims against the estates of deceased persons was not applicable to the claim of the said complainant herein.

3. The Court erred in holding and deciding that it was not necessary for complainant to present his claim against the estate of John M. Smith, deceased, to the executrix thereof [169] within the period of publication of notice to creditors of said estate, to wit, within ten months after the first publication of such notice, to wit, within ten months after November 18, 1908.

4. The Court erred in holding and deciding that complainant's claim herein, and upon which this action is founded, is one not arising in contract.

5. The Court erred in holding and deciding that complainant's cause of action herein was not barred by the Montana Statute of Limitations, to wit, by section 6449, subdivision 4, and section 6451 of the Revised Codes of Montana of 1907.

6. The Court erred in holding and deciding that the present action is one within the exception to the Montana Statute of Limitations, to wit, is one within and covered by the provisions of section 6458 of the Revised Codes of Montana of 1907.

7. The Court erred in holding and deciding that the Montana Statute of Limitations, in so far as the present action is concerned, was sustained during the absence of the defendant, executrix of the estate of John M. Smith, deceased, from the State of Montana.

8. The Court erred in holding and deciding the complainant was not guilty of laches in the bringing and prosecuting of the present action.

9. The Court erred in holding and deciding that the present action was not covered by and within the judgment of the District Court of the State of Montana of the Tenth Judicial District, in and for the County of Meagher, and of the Supreme Court of said State, in favor of this defendant and against said complainant, and that the complainant was not estopped and barred from maintaining the present action by reason of said judgment, and that said judgment is in *res adjudicata* of the present action. [170]

10. The Court erred in holding and deciding that the order of the District Court of the Tenth Judicial District of the State of Montana, in and for the

County of Meagher, made and entered in said court on December 11, 1900, in the matter of the guardianship of William Smith, complainant herein, which was then pending in said court, and which order permitted the borrowing by John M. Smith, the guardian, of said minor, of certain moneys belonging to him, was void.

11. The Court erred in holding and deciding that the order of the said District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, whereby the final account of said John M. Smith, as guardian of said minor, was approved, and whereby the said John M. Smith, as such guardian, was discharged from his guardianship, was void and of no effect.

12. The Court erred in holding and deciding that plaintiff had not made an election of remedies which was conclusive upon him against his maintaining the present action when he brought and maintained in the State courts of Montana, to wit, in the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher, and in the Supreme Court of said State, said action, wherein and whereby he sought to set aside the sale of certain property belonging to said complainant, as a minor, to himself as guardian, in said guardianship proceeding.

13. The Court erred in deciding the present action in favor of complainant and against the defendant, and in ordering and entering judgment herein in favor of said complainant and against said defendant.

14. The Court erred in refusing to order and have entered judgment herein in favor of said defendant and against said complainant. [171]

15. The decree entered herein is erroneous in that judgment is thereby awarded against the estate of John M. Smith, deceased, and against defendant as executrix thereof generally, whereas, under and by virtue of the statutes of the State of Montana the judgment, in an action such as the one at bar, should be in the event that it is in favor of the complainant that his claim is allowed and that it should be paid out of the funds of the estate in due course of administration of said estate and not otherwise. Revised Codes of Montana of 1907, section 7536.

Wherefore, the said defendant prays that said decree be reversed and the said District Court be instructed and ordered to enter such decree as the Circuit Court of Appeals of the United States for the Ninth Circuit shall deem meet and proper on the record.

H. G. and S. H. McINTIRE,
R. LEE WORD,
Solicitors for Defendant.

Filed June 29, 1914. Geo. W. Sproule, Clerk. [172]

Thereafter, on June 29, 1914, Order Allowing Appeal was duly made and entered herein, in the words and figures following, to wit:

[Order Allowing Appeal.]

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

At a stated term, to wit, the April term, A. D. 1914, of the District Court of the United States, of the Ninth Circuit, in and for the District of Montana, held at the courtroom in the City of Helena, State of Montana, on the 29th day of June, 1914; present, the Honorable Geo. M. Bourquin, District Judge. On reading and filing the petition of Mary M. Smith, as executrix of John M. Smith, deceased, defendant herein, for an order allowing an appeal, and the assignment of errors herein made and signed by the said Mary M. Smith on motion of Messrs. R. Lee Word and H. G. and S. H. McIntire, counsel for said defendant and appellant, Messrs. C. B. Nolan and William Scallon, counsel for respondent, being present,

It is Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the said city of San Francisco, and the State of California, from the final decree heretofore made,

entered and filed herein on the 10th day of February, A. D. 1914, be and the same is hereby allowed, and that a transcript of the record be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, said record to consist of a printed copy of the transcript, together with a transcript of all proceedings had and [173] used in the present action.

It is further ordered that the amount of the security on appeal herein to be furnished by the said Mary M. Smith, as executrix of the estate of John M. Smith, deceased, be and the same is hereby fixed at the sum of One Thousand Dollars, and that upon the making and filing with the Clerk of this court of a good and sufficient bond in said sum by the said Mary M. Smith, executrix as aforesaid, all further proceedings be superseded and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals, and until the further order of this court.

GEO. M. BOURQUIN,
Judge.

Filed and entered June 29, 1914. Geo. W. Sproule, Clerk. [174]

Thereafter, on June 30, 1914, Bond on Appeal was duly approved and filed herein, in the words and figures following, to wit:

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, Mary M. Smith, as executrix of the estate of John M. Smith, deceased, as principal, and the Montana Trust & Savings Bank Company, a corporation, as surety, are held and firmly bound unto the above-named William Smith in the sum of One Thousand Dollars ($1,000.00) for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 29th day of June, 1914.

Whereas, the above-named defendant has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse a decree rendered in the above-entitled cause, in the District Court of the United States, Ninth Circuit, District of

Montana, on the 10th day of February, 1914.

Now, therefore, the condition of this obligation is such that if the above-named defendant, Mary M. Smith, as executrix of the estate of John M. Smith, deceased, shall prosecute her said appeal to effect, and shall answer all damages and costs that may be awarded against her if she fails to make good her [175] plea, then the above obligation is to be void; otherwise, to remain in full force and virtue.

[Corporate Seal] MARY M. SMITH,
As Executrix of the Will and Estate of John M. Smith, Deceased,
By H. G. & S. H. McINTIRE,
Her Attorneys in Fact.
MONTANA TRUST & SAVINGS BANK,
T. O. HAMMOND,
Cashier. [176]

State of Montana,
County of Lewis and Clark,—ss.

On this 29th day of June, 1914, before me, V. L. McCarthy, a Notary Public for the State of Montana, residing in the city of Helena, came T. O. Hammond, cashier of the Montana Trust & Savings Bank Company, to me personally known to be the cashier of said company, a corporation described in and which executed as surety the annexed bond, and being by me first duly sworn, stated that he, as cashier, duly executed the preceding instrument by order and authority of the Board of Directors of said Montana Trust & Savings Bank Company, and that the seal affixed to the preceding instrument is the corporate seal of the said company, that the corporate seal was

duly affixed by the authority of the Board of Directors of said company, and that the said Montana Trust & Savings Bank is duly and legally incorporated under the laws of the State of Montana, and is authorized under its charter to transact, and is transacting, the business of a surety company in the State of Montana, that said company has complied with all the laws of the State of Montana relating to surety companies doing business in that State, and is duly licensed and legally authorized by said State to qualify as sole surety on the bond hereto annexed; that the said company is authorized by its articles of incorporation and by its by-laws to execute the said bond, and that said T. O. Hammond, affiant, has been duly authorized by the Board of Directors of the said company to execute the foregoing bond.

T. O. HAMMOND.

Subscribed and sworn to before me this 29th day of June, 1914.

[Notarial Seal] V. L. McCARTHY,
Notary Public.

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires February 7th, 1917. [177]

The within undertaking on appeal is hereby approved.

Helena, Montana, June 30th, 1914.

GEO. M. BOURQUIN,
Judge.

Filed June 30, 1914. Geo. W. Sproule, Clerk. [178]

Thereafter, on June 30, 1914, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to wit: [179]

In the District Court of the United States, Ninth Circuit, District of Montana.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Will of JOHN M. SMITH, Deceased,

Defendant.

Citation [on Appeal (Original)].

United States of America,
District of Montana,—ss.

The President of the United States to William Smith, and to C. B. Nolan and William Scallon, His Solicitors:

You are herewith cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, State of California, within 30 days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the District Court of the United States, Ninth Circuit, in and for the District of Montana, wherein William Smith is complainant and respondent, and Mary M. Smith, as executrix of the will of John M. Smith, deceased, is defendant and appellant, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be corrected and why speedy jus-

tice should not be done to the parties in that behalf.

WITNESS the Honorable GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, this 30th day of June, A. D. 1914.

GEO. M. BOURQUIN,
Judge of the District Court of the United States, for the District of Montana.

Personal service of the foregoing citation upon us and receipt [180] of a copy thereof this 30th day of June, 1914, is hereby acknowledged.

T. J. WALSH,
C. B. NOLAN and
WM. SCALLON,
Solicitors for Complainant. [181]

[Endorsed]: No. 5. In the District Court of the United States for the District of Montana. Wm. Smith vs. Mary M. Smith, as Executrix. Citation. Filed June 30th, 1914. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [182]

Thereafter, on July 2, 1914, a Praecipe for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [183]

[Praecipe for Transcript of Record.]

In the District Court of the United States, in and for the District of Montana.

IN EQUITY.

WILLIAM SMITH,

Complainant,

vs.

MARY M. SMITH, as Executrix of the Estate of JOHN M. SMITH, Deceased,

Defendant.

To the Clerk of said Court:

You will please incorporate into the transcript on appeal in the above-entitled action the following portions of the record in said cause, to wit: The bill of complaint, the subpoena with proof of service, defendant's answer to the bill of complaint, the statement of the evidence had on the trial of said cause, settled by the Judge, including Defendant's Exhibits "A" and "B," the opinion of the Court rendered in said cause, the final decree rendered and entered therein, the petition on appeal together with the Court's allowance thereof, the assignment of errors, the order of Court allowing the appeal, the bond on appeal, the citation on appeal together with proof of service thereof, the Clerk's certificate to transcript

of record, and the names and addresses of the solicitors of record.

Yours etc.,
R. LEE WORD,
H. G. & S. H. McINTIRE,
Solicitors for Defendant.

Helena, Montana, July 2, 1914.

Service upon us this 2d day of July, 1914, of a copy of the foregoing praecipe indicating portions of the record to be incorporated in the transcript on appeal is hereby acknowledged.

C. B. NOLAN and
WM. SCALLON,
Solicitors for Complainant.

Filed July 2, 1914. Geo. W. Sproule, Clerk. [184]

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, of 185 pages, numbered consecutively from 1 to 185, inclusive, is a full, true and correct transcript of the bill of complaint, subpoena with proof of service, answer, statement of evidence, opinion, final decree, petition for appeal, assignment of errors, order allowing appeal, bond and praecipe for transcript of record on appeal, mentioned in said praecipe for transcript, as appears

from the original records and files of said court in my possession as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Thirty-one and 70/100 Dollars ($31.70), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 17th day of July, A. D. 1914.

[Seal] GEO. W. SPROULE,
Clerk. [185]

[Endorsed]: No. 2448. United States Circuit Court of Appeals for the Ninth Circuit. Mary M. Smith, as Executrix of the Will of John M. Smith, Deceased, Appellant, vs. William Smith, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Received and filed July 21, 1914.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.